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In the
Supreme Court of the United States

OCTOBER TERM, 1982

MARATHON PIPELINE COMPANY
Respondent,

versus

ROWAN COMPANIES, INC. and
DRILLING RIG ROWAN/ODESSA,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES E. BLAZEK
ALAN A. ZAUNBRECHER
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234
Attorneys for Petitioner

ERNEST A. CARRERE, JR.
JAMES E. WRIGHT, III
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street, 28th Floor
New Orleans, LA 70112
(504) 581-6641
Attorneys for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

1. Whether the District Court violated Rule 615 of the Federal Rules of Evidence and the "due process" clause of the Fifth Amendment to the United States Constitution by failing to allow a corporate defendant to have its selected company representative sit at counsel table and assist in the company's defense?

LIST OF INTERESTED PARTIES

Counsel of record for Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA certify that the following listed parties have an interest in the outcome of this case. These representations are in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Marathon Pipeline Company, represented by Henry J. Read and A. Gordon Grant, Jr. of Montgomery, Barnett, Brown & Read, 1800 First NBC Building, New Orleans, LA 70112.

2. Sun Oil Company and Sun Gas Company, represented by P. Albert Bienvenu and John E. McAuliffe, Jr. of Bienvenu, Foster, Ryan & O'Bannon, 200 Carondelet Street, New Orleans, LA 70130.

3. John E. Chance & Associates, Inc., represented by Charles W. Steen and Larry M. Rodel of Liskow & Lewis, 50th floor, One Shell Square, New Orleans, LA 70139.

4. Twenty Grand Offshore, Inc., Tidewater Marine Services, Inc., the tug EL ZORRO GRANDE, the tug EL JAGUAR GRANDE, and the tug LEO PARDO GRANDE, represented by George W. Healy, III and Richard N. Dicharry of Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, LA 70112.

5. Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA, represented by James E. Blazek and Alan A. Zaunbrecher of Adams & Reese, 4500 One Shell Square, New Orleans, LA 70139, and Ernest A. Carrere, Jr. and James E. Wright, III of Jones Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, LA 70112.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MARATHON PIPELINE COMPANY
Respondent,

versus

ROWAN COMPANIES, INC. and
DRILLING RIG ROWAN/ODESSA,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals, affirming the District Court's Judgment against the petitioner appears in Appendix A to this Petition, and is reported at __F.2d__ Slip Opinion No. 81-3779 (5th Cir. February 28, 1983). The Order of the Court of Appeals denying a Petition for Rehearing appears in Appendix B. The Opinion and Order of the District Court appears in Appendix C and is reported at 527 F.Supp. 824 (E.D.La. 1982).

JURISDICTION

The Fifth Circuit's Opinion and Judgment affirming the District Court's Judgment against the petitioner is

set forth in Appendix A. The Court's Order denying the Petition for Rehearing is set forth in Appendix B. This Petition for Certiorari is being filed within sixty (60) days of the Circuit Court's denial of the Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Rule 615 of the Federal Rules of Evidence

Rule 615. Exclusion of Witnesses

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

2. Fifth Amendment to the Constitution of the United States

Amendment V[1791].

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Marathon Pipeline Company brought this suit under the General Maritime Law and the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b), seeking damages allegedly sustained when a pipeline owned by them was ruptured on August 5, 1978. Marathon filed suit against the various defendants, all of whom were involved in the movement of the jack-up drilling rig ROWAN/ODESSA in the vicinity of Marathon's pipeline at the time of the alleged rupture.

Trial without a jury on the sole issue of liability was held on January 14-16, 1981. At the outset of the trial, petitioner selected Robert McCary as their company representative pursuant to Rule 615(2) of the Federal Rules of Evidence to assist counsel in Rowan's defense. The Court refused Rowan's request to allow McCary to sit at counsel table. (See Appendix D—pages 4-5 of the District Court Transcript) Judgment was rendered on December 1, 1981, based on the Court's Opinion filed on November 24, 1981. The Court found the defendant, Rowan Companies, Inc. and the drilling rig ROWAN/ODESSA, solely liable to Marathon, and dismissed the various other defendants.

Petitioner, Rowan Companies, Inc., appealed to the United States Fifth Circuit Court of Appeals on the basis that the District Court had committed reversible error in sequestering Rowan's designated company representative, in direct violation of Rule 615 of the Federal Rules of Evidence and in violation of the "due process" clause of the Fifth Amendment to the United States Constitution. The Fifth

Circuit affirmed the District Court Judgment and denied Rowan's timely filed Petition for Rehearing. Rowan now seeks relief from this Honorable Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE SEQUESTRATION OF THE PETITIONER'S DESIGNATED COMPANY REPRESENTATIVE WAS IN DIRECT VIOLATION OF RULE 615 OF THE FEDERAL RULES OF EVIDENCE AND DENIED THE PETITIONER "DUE PROCESS" OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

At the outset of the trial of this matter, the District Court ordered the sequestration of the selected Rowan representative, Mr. Robert G. McCary. (See Appendix D—Trial Transcript pages 4-5) It is without doubt that Mr. McCary was Rowan's selected company representative, chosen to assist counsel in all aspects of Rowan's defense.

The District Court's refusal to permit McCary's attendance during the trial left Rowan Companies without a company representative at counsel table, a right clearly recognized by Rule 615 of the Federal Rules of Evidence:

> Rule 615. Exclusion of Witnesses
>
> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does *not* authorize exclusion of (1) a party who is a natural person, or (2) *an officer or employee of a party which is not a natural person designated as its repre-*

> *sentative by its attorney,* or (3) a person whose presence is shown by a party to be essential to the presentation of his cause. (emphasis supplied)

Since the promulgation of this Rule in 1975, the absolute right of a party which is not a natural person (i.e., a corporation or organization) to have a company representative *or employee* at counsel table has been repeatedly recognized. See, e.g., *Varlack v. S.W.C. Carribean, Inc.*, 500 F.2d 171 (3rd Cir. 1977); *U.S. v. Auten*, 570 F.2d 1284 (5th Cir. 1978), *cert. denied*, 439 U.S. 899 (1978); *U.S. v. Boyer*, 574 F.2d 951 (8th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978). Prior to 1975, the trial court had the discretion to refuse to allow a company representative to sit at counsel table. However, since the revision of the Federal Rules of Evidence in 1975, the provision of subpart (2) of Rule 615 makes it clear that no discretion is allowed and the refusal to allow the company representative to sit at counsel table constitutes reversible error. *Varlack, supra; Auten, supra; Boyer, supra.*

Under this Rule, no distinction has been made between corporate officers or employees who are needed at counsel table in civil actions and law enforcement agents or officers assisting in the prosecution of criminal actions. The absolute right of a non-person party to have such witnesses sit at counsel table and assist at trial is clearly contemplated by the Rule.

The notes of the Senate Advisory Committee clearly reflect the constitutional rationale for the Rule:

> [T]he exclusion of persons who are parties would raise serious problems of confrontation and due process....As the equivalent of the right of a natural person party to be present, a party which is not a natural person *is entitled to have a representative*

present. Notes of the Senate Advisory Committee to Rule 615 of the Federal Rules of Evidence (emphasis supplied).

It is obvious that the Senate Committee recognized that the sequestration of the representative of a corporation selected by the corporation's counsel would violate the due process guarantees of the Fifth Amendment.

It is axiomatic that "fair play" is the essence of due process. *Galvin v. Press,* 74 S.Ct. 737; 347 U.S. 522; 98 L.Ed. 911, *rehearing denied* 75 S.Ct. 17; 348 U.S. 852; 99 L.Ed. 671 (1954); *Cox v. Burke,* 361 F.2d 183 (7th Cir. 1966), *cert. denied,* 87 S.Ct. 304; 385 U.S. 939; 17 L.Ed.2d 218 (1966). While the exact procedures demanded by due process are determined by the circumstances of each particular situation, determination of the appropriateness of the procedure requires balancing the governmental functions involved against the private interests affected. *Wright v. Finch,* 321 F.Supp. 383 (D.C.D.C. 1971). It is submitted that the sequestration of Rowan's selected company representative violated that delicate balance at the cost of Rowan's due process rights.

Several federal courts have expressly recognized the right to a representative as being fundamental to corporate defendants, in order to ensure the "fair play" guarantees of the "due process" clause. For example, in *Varlack, supra,* after the District Court had sequestered a corporate defendant's selected representative, the Court of Appeals reversed the District Court, holding that the sequestration "impermissibly nullified [the defendant's] important right to be present during trial". 550 F.2d at 176. Other federal jurisdictions have reached similar results. See, e.g., *U.S. v. Causey,* 609 F.2d 777 (5th Cir. 1977); *Cannon v. Fidelity Casualty*

Company of New York, 519 F.Supp. 668 (D.Del. 1981).

Similarly, many state jurisdictions have held that the right of a corporate defendant to have a representative present at counsel table is fundamental. See, e.g., *Commercial Credit Equipment Corp. v. Kilgore,* 221 So.2d 363, 367 (Miss. 1969); *Montgomery v. City of New Orleans,* 226 So.2d 482 (La. App. 4th Cir. 1972); *Jacques v. Ellis,* 219 S.W.2d 104 (Tex.Cir.App. 1949); *Shepard v. Swatting,* 234 N.Y.S.2d 370 (N.Y. 1962).

Leading legal commentators have also recognized a corporation's fundamental right to representation at counsel table during trial. For example, Professor Moore noted in his highly respected analysis of the Federal Rules that "[a]s equivalent to the right of a natural person party to be present, a party which is not a natural person is entitled to have a representative present". 10 Moore's Federal Practice 2d, §615.02.

Rule 615 clearly allows a trial judge broad discretion in sequestering witnesses who do not fit into one of the exceptions to Rule 615. The trial judge does not, however, have any discretion to sequester a party or a designated representative of a non-natural party. Rule 615(a) is *mandatory* and expressly prohibits such sequestration. See: *In Re United States,* 584 F.2d 666 (5th Cir. 1978); *Cannon, supra.*

By violating the express provisions of Rule 615(2), the trial court prevented counsel for Rowan from adequately communicating with their client during trial. This inability to communicate with some Rowan representative obviously adversely affected counsel's ability to represent their client. The importance of adequate communication between attorney and client has been repeatedly recognized. For

example, in *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir. 1980), the Fifth Circuit reversed the decision of the trial court prohibiting the defendant from consulting with his attorney during trial recesses, noting that:

> The need for attorney-client communication is certainly no less in a civil case [than in a criminal case]....The right to retain counsel in civil litigation is implicit in the concept of the Fifth Amendment due process. *Id.*, at 1117-1118.

and,

> Judge Hand's denial of any attorney-client communication resulted in a significant deprivation of the effective assistance of counsel.... *Id.*, at 1119.

It is submitted that attorney-client communication *during* trial is more crucial than even during recesses since the client or its representative, having intimate knowledge of the complex factual situation or specialized subject matter of the litigation, can assist even the best prepared counsel in meeting trial surprises and explaining certain testimony.

The exclusion of the petitioner's selected company representative was in clear violation of Rule 615, and resulted in the denial of the "due process" guarantees of the Fifth Amendment.

CONCLUSION

For all the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted, thereby allowing this Court to correct the manifest error in the trial court, and fulfill the "due process" guarantees of the Fifth Amendment.

JAMES E. BLAZEK
Attorney for Rowan Companies, Inc.
and the Drilling Rig ROWAN/ODESSA
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

PROOF OF SERVICE
CERTIFICATE OF BAR MEMBER

I, James E. Blazek, one of the attorneys for Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 26th of May, 1983, I served three (3) copies of the foregoing Petition for Writ of Certiorari on all the parties required to be served under Rule 28 of the Rules of the United States Supreme Court, as follows:

1. Henry J. Read, Esq., attorney for Marathon Pipeline Company, at Montgomery, Barnett, Brown & Read, 1800 First NBC Building, New Orleans, LA 70112.

2. P. Albert Bienvenu, Esq., attorney for Sun Oil Company and Sun Gas Company, at Foster, Ryan & O'Bannon, 200 Carondelet Street, New Orleans, LA 70130.

3. Charles W. Steen, Esq., attorney for John E. Chance & Associates, Inc., at Liskow & Lewis, 50th Floor One Shell Square, New Orleans, LA 70139.

4. George W. Healy, III, Esq., attorney for Twenty Grand Offshore, Inc., Tidewater Marine Services, Inc., the tug EL ZORRO GRANDE, the tug EL JAGUAR GRANDE, and the tug LEO PARDO GRANDE, at Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, LA 70112.

JAMES E. BLAZEK
Attorney for Rowan Companies, Inc.
and the Drilling Rig ROWAN/ODESSA
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

APPENDIX "A"

MARATHON PIPE LINE COMPANY,
Plaintiff-Appellee Cross-Appellant,

v.

DRILLING RIG ROWAN/ODESSA,
Rowan Companies, Inc.,
Defendants-Appellants,

v.

Tug El Zorro Grande, et al.,
Defendants-Appellees,

Sun Oil Company, et al.,
Defendants-Appellees, Cross-Appellants.

No. 81-3779.

United States Court of Appeals,
Fifth Circuit.

Feb. 28, 1983.

Pipe line owner brought suit in admiralty seeking compensation for damage sustained when pipeline was struck by drilling rig as rig was being moved to location of underwater oil well. The District Court, George Arceneaux, Jr., 527 F.Supp. 824, entered judgment in favor of pipe line owner, and an appeal was taken. The Court of Appeals held that sequestration of witness whom drilling rig owner sought to have present in courtroom as its "representative" was not established as successful ground for appeal.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

We AFFIRM on the basis of the opinion of the district court, 527 F.Supp. 824, with the additional finding which follows.

The district court did not discuss in its opinion an issue which has been raised by the Rowan Companies in its appeal. At the outset of the trial the district court ordered the sequestration of the witnesses, including Mr. Robert G. McCary, who was the person placed in charge of the moving of the drilling rig Rowan/Odessa. Mr. McCary was allowed to remain in the courtroom only after his testimony. Rowan now claims that Mr. McCary was its "designated representative" and, therefore, could not be excluded from the courtroom under Rule 615, Fed.R.Evid.

For any one of three reasons we find that the district court must be affirmed on its sequestration ruling. First, while the record makes it clear that the Rowan Companies stated Mr. McCary was their "representative" before the court placed him under the general order of sequestration, no objection nor claim of violation of the Constitution or laws or of Rule 615, Fed.R.Evid., was lodged by the Rowan Companies. There was not the slightest indication given that Rowan in any way disapproved of the ruling of the trial judge at that time or at any other time while this case was pending in the district court. This, undoubtedly, is why the district court did not refer to this matter in its opinion.

While it is true that Rule 46 of the Fed.R.Civ.P. does not require formal exceptions to rulings or orders of the court, that rule requires that the party must make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." After the objection to McCary's presence was made by another party, Rowan did not make known to the court any action which it desired the court to take. Nor did it object to the action of the court. Reading the record, there is no way that the court could have concluded that Rowan wished to make an issue of its action or disagreed with it in the slightest degree.

Second, on the face of the record McCary was not an employee of the Rowan Companies, Inc., the party to the proceedings. McCary testified on the stand that he was an employee, apparently, of a separate corporation, Rowan International. Rule 615, Fed.R.Evid., requires that to be excepted from scquestration the representative must be "an officer or employee of a party which is not a natural person...." Nothing in the record shows what the relationship was between the Rowan Companies and Rowan International nor does it show that McCary actually was an employee of the Rowan Companies, Inc. The record does not establish that the Rowan Companies were entitled to claim McCary as their representative under Rule 615.

Third, even assuming that the district court committed error in sequestering Mr. McCary, there was not the slightest reference to the effect of this sequestration throughout the entire record. The Rowan Companies make no showing that the ruling was prejudicial, and prejudice must be shown to justify reversal. As this Court held in *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), the failure to sequester government witnesses,

while clearly error, does not require reversal even in a criminal case without proof of prejudice.

We find that defendant Rowan Companies, Inc. have not established as a successful ground for appeal the sequestration of Mr. McCary from the courtroom until he was called as a witness.

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3779

MARATHON PIPE LINE COMPANY,

Plaintiff-Appellee
Cross-Appellant,

versus

DRILLING RIG ROWAN/ODESSA,
ROWAN COMPANIES, INC.,

Defendants-Appellants,

versus

TUG EL ZORRO GRANDE, ET AL.,

Defendants-Appellees,

SUN OIL COMPANY, ET AL.,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(March 31, 1983)

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARATHON PIPE LINE COMPANY	CIVIL ACTION
VERSUS	NO. 79-403
DRILLING RIG ROWAN/ODESSA, et al	SECTION "K"

JUDGMENT

This cause came on for trial before the court on a former day, and after hearing testimony of witnesses and considering the evidence adduced, the Court took the matter under submission.

Now, therefore, considering the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Tug El Zorro Grande, *in rem*, Tug El Jaguar Grande, *in rem*, M/V Leopardo Grande, *in rem*, Sun Oil Company, Sun Gas Company, Inc., John E. Chance & Associates, Inc., Twenty Grand Offshore, Inc., and Tidewater Marine Service, Inc., and against plaintiff, Marathon Pipe Line Company, dismissing said plaintiff's complaint with prejudice, each party to bear its own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all cross claims are hereby Dismissed.

New Orleans, Louisiana, this 1st day of December, 1981.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARATHON PIPE LINE COMPANY — CIVIL ACTION

VERSUS — NO. 79-403

DRILLING RIG — SECTION "K"

ROWAN/ODESSA, ET AL.

OPINION

Plaintiff, Marathon Pipe Line Company ("Marathon"), owner of an eight-inch oil pipeline installed on the floor of the Gulf of Mexico, has brought this suit in admiralty seeking compensation for damage sustained by a portion of the pipeline on August 5, 1978. Defendants are the Drilling Rig ROWAN ODESSA ("ROWAN ODESSA"), *in rem*, and its owner, Rowan Companies, Inc. ("Rowan"), the Tugs EL ZORRO GRANDE ("EL ZORRO"), EL JAGUAR GRANDE ("EL JAGUAR"), LEOPARDO GRANDE ("LEOPARDO"), *in rem*, their owner, Twenty Grand Offshore, Inc. ("Twenty Grand"), their operator, Tidewater Marine Service, Inc. ("Tidewater"), Sun Oil Company ("Sun Oil"), Sun Gas Company ("Sun Gas"), and John E. Chance & Associates, Inc. ("Chance").

Defendants deny liability. Defendants Sun Oil and Sun Gas have cross-claimed against all of the defendant vessels and the other defendants. Defendants Twenty Grand and Tidewater have cross-claimed against defendants Chance and Rowan. Defendant Rowan has cross-claimed against the three defendant tugs, Chance, Twenty Grand, Tidewater and Sun Oil. Defendant Chance has cross-claimed against all defendant vessels and all other defendants.

The matter came on for trial on Januray 14, 1981, and considered solely the issue of liability; the issue of quantum was reserved. The parties filed post-trial briefs, and the matter was taken under submission. Having thoroughly reviewed the evidence, the memoranda filed by counsel, and the applicable law, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1.

At all times pertinent, plaintiff Marathon, a corporation organized under the laws of the State of Delaware, was the owner of an all-welded, seamless, eight-inch diameter submerged oil pipeline. This pipeline ran in a northeast direction, between the Sun Oil "A" platform in East Cameron Block 338 and the Marathon "A" platform in East Cameron Block 321. It extended a distance of 7.34 miles and was constructed and installed on the floor of the Gulf of Mexico in accordance with all permits required by law. The water depth at the northern end of the pipeline ("Block 321") was approximately 210 feet and at the southern end ("Block 338") was approximately 260 feet.

2.

At all times pertinent, defendant Sun Oil was a corporation organized under the laws of the State of Delaware and, on August 4, 1978, was the operator of a lease in East Cameron Block 331. However, Sun Oil had previously obtained the necessary rights to directionally drill a well from East Cameron Block 330 into Block 331 at a proposed location approximately 1500 feet to the east of the Marathon pipeline since the East Cameron Block 331 location was

within a shipping fairway.

3.

On July 31, 1978, Sun Oil contracted with Rowan, a corporation organized under the laws of the State of Delaware, to furnish the ROWAN ODESSA to drill the proposed well. The contract between the parties was prepared by Rowan.

4.

Under the terms of its contract with Rowan, (entitled "Agreement"), Sun Oil agreed to: provide Rowan with a "guidepath" and access to the drillsite location, advise Rowan of any subsurface conditions or obstructions which Rowan might encounter during operations under the agreement, survey and mark locations, and provide towing service.

5.

The contract between Sun Oil and Rowan contained, among other, the following provisions:

> 8. (b) *Operator of Drilling Unit.*
>
> Contractor shall be solely responsible for the operation of the Rig, including, without limitation, supervising moving operations, positioning on drilling locations as required by Operator, jacking up and jacking down operations, as well as such operations on board the Rig as may be necessary or desirable for the safety of the Rig. Operations under this Agreement will be performed on a 24-hour day basis.

9. (f) *Indemnity Provisions.*

(l) *Contractor's [Rowan's] Indemnification of Operator [Sun].*

Contractor agrees to protect, defend, indemnify and save Operator and its joint owners harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Contractor's employees, Contractor's subcontractors or their employees, on account of bodily injury, death or damage to property ....

(2) *Operator's Indemnification of Contractor.*

Operator agrees to protect, defend, indemnify and save Contractor harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Operator's employees, Operator's contractors or their employees, other than those identified in 9(f)(1) above, on account of bodily injury, death or damage to property...

12. *Independent Contractor.*

Contractor is an independent Contractor. Neither Contractor, its employees, subcontractors or their employees, are agents or employees of Operator. The entire performance, operations management and control of the Rig and other items of Contractor's equipment shall be under the exclusive control and command of Contractor, and shall be carried out by Contractor with the primary purpose of performing all acts necessary to execute the

> work required by the Operator's drilling program for each well, consistent with safety. It shall be the sole exclusive duty of Contractor to determine at all times, whether operations can be safely continued or undertaken, including, without limiting the generality of the foregoing, the duty to determine by Contractor's own inspection that all cargo and items of equipment are loaded and stored in a proper manner and the Rig is suitable to undertake any contemplated operation under the then existing conditions.

6.

In order to determine whether any underwater obstructions existed in the area, Sun Oil relied on information received from Clark Oil Company ("Clark"), which information was compiled by Clark in December of 1976. Sun Oil provided Rowan with a map showing the as-built location of the pipeline; however, the map was lost prior to trial and was never admitted into evidence. Sun Oil engaged the services of Chance to survey and mark the drilling location. In addition, prior to the arrival of the ROWAN ODESSA at the drilling location, Chance, as requested by Sun Oil, placed three (3) marking buoys along the Marathon pipeline, so as to identify its location. Finally, Sun Oil, pursuant to Schedule E(2) of its agreement with Rowan, assumed the cost of the tugs engaged by Rowan to tow the ROWAN ODESSA to location.

7.

The ROWAN ODESSA is a jack-up drilling vessel, official number 579021, measuring 247 feet in length, 200 feet in width, with a hull depth of 26 feet. It has three retractable legs, 410 feet in length, which can be raised or lowered

at a constant rate of 90 feet per hour.

The vessel is not self-propelled and must be towed by other vessels. When being moved, she is under the command of a Rowan employee, variously referred to as the "rig mover" or "rig manager". At all times pertinent, the rig mover was R. G. McCary.

8.

Under the terms of its agreement with Sun Oil, Rowan agreed to: carry out all operations under the agreement with due diligence, in a safe, workmanlike manner and be solely responsible for the operation of the rig, including, without limitation, *supervising moving operations, positioning on drilling locations as required by Operator, jacking up and jacking down operations.* (Emphasis supplied).

9.

On August 2, 1978, Rowan contacted Tidewater, requesting three tugs to tow the ROWAN ODESSA from a drillsite off of the Texas Coast to East Cameron Block 330. The towing expense was assumed by Sun Oil pursuant to its agreement with Rowan.

At all times pertinent, the three tugs towing the ROWAN ODESSA to its location in East Cameron Block 330, the EL JAGUAR GRANDE, EL ZORRO GRANDE and LEOPARDO GRANDE, were diesel-powered, documented, ocean-going vessels, owned by defendant Twenty Grand and operated by defendant Tidewater. Pursuant to the contract between Sun Oil and Rowan, and through the use of the three tugs, the ROWAN ODESSA, under McCary's command, was put under tow toward the

designated drillsite on August 3, 1978.

10.

At all times pertinent, defendant Chance was a corporation organized and doing business under the laws of the State of Louisiana.

Sun Oil contracted with Chance for surveying services, and on July 28, 1978, requested that Chance buoy the drilling site. On August 4, 1978, while the ROWAN ODESSA was in tow toward the drilling location, Sun Oil also requested that Chance place marker buoys on the pipeline which was located approximately 1500 feet west of the proposed drillsite. On that date, Chance marked the well location, placed two reference buoys to the northeast and northwest of the site, and placed three buoys on the pipeline directly west of the site.

The three buoys marking the pipeline west of the wellsite were placed at 1500 foot intervals. One was placed due west on the site while the remaining two buoys were placed 1500 feet northeast and southwest of the first buoy. Subsequent surveys indicated that the wellsite and pipeline buoys were placed within expected tolerance limits. Each buoy consisted of one cubic foot piece of styrofoam, topped with an eight-foot cane pole. Attached to each pole was a six-volt battery, non-flashing bulb, and a small black and white flag.

The request to buoy the pipeline was transmitted by telephone from Sun Oil to Chance after the Chance surveyors were offshore. As a result, Chance, in its office, made the calculations necessary to locate the pipeline and radioed the information to its offshore crew.

On board the ROWAN ODESSA during the move was Rowan rig mover, McCary, Rowan toolpusher Lindsey Rogers, Captain Dillman, the rig's marine hull underwriters' representative, Sun Oil's drilling foreman, Richard Oliver, and the Rowan crew. McCary, as rig mover, was in command of the vessel, while Oliver's duties involved checking the rig's inventory and equipment used for drilling. Although Oliver was responsible for seeing that the rig was properly located on the wellsite, he had nothing to do with the lowering of the rig's legs, or with moving the vessel toward location.

On or about August 2, 1978, Sun Oil obtained from Marathon a map showing the as-built location of the pipeline and its proximity to the drilling location. This map disappeared from the rig after the pipeline was damaged and was never found. It therefore was not produced fro trial. On or about August 4, 1978, Sun Oil sent the map to the rig by helicopter, for use by rig personnel. This map was reviewed by McCary, Captain Dillman and Oliver, in the course of the rig move. Oliver testified that, in addition to this map, he had onboard yet another chart, which also mysteriously vanished and which also showed the wellsite and its proximity to the pipeline. Oliver testified that the pipeline was shown on their maps as running from the southwest to the northeast, while Dillman and McCary testified that the pipeline appeared to run north to south.

There was considerable testimony concerning the reliance of McCary, Dillman and Oliver upon the siting of the rig inside of a "triangle", created by the Sun Oil, Marathon and Aminoil platforms. The Marathon platform in Block 321 was north of the wellsite while the Sun platform

in Block 330 was southwest of the site. The Amnoil platform was located northeast of the drillsite. Oliver stated that he considered the location of these platforms as visual indicia of an imaginary "triangle" of safety. If the rig was inside of this triangle, it would not contact the pipeline.

The Court finds that the Rowan employees onboard the ROWAN ODESSA and responsible for moving the rig were well aware of the presence of the Marathon pipeline long before arriving at the proposed drillsite.

13.

At approximately 8:00 p.m. on August 4, 1978, the captain of the EL ZORRO GRANDE, Otis Wisdom, was contacted by McCary, who requested that the rig receive one hour's notice prior to arrival in the vicinity of the location so that the rig could begin lowering its legs. At approximately 10:30 p.m., Wisdom informed the rig that the flotilla was approximately one hour from "location", that is, from Block 330. Wisdom was also informed that the "jacking-down" rate of the rig's legs was one and a half feet per minute; he was requested to determine, from the survey boat, what the water depth was at the wellsite. The tug then relayed a depth reading, provided by the survey boat to the rig, of 255 feet. This figure is contrasted with the 249 foot reading which appeared on the Sun Oil "Drilling Program."

The lead tug decided that the flotilla would enter the block to the north, rather than directly to the west of the wellsite. Several witnesses agreed that such an approach would be customary, under these circumstancces, to avoid "wiping out" the location buoy.

14.

Chance surveyor Caillier was aboard the Chance survey boat, GULF SURVEYOR, and in radio communication with the rig and its tug boats when the flotilla was several hours away from the wellsite. He communicated to the flotilla that a pipeline was in the vicinity of the wellsite and was told by McCary that he, McCary, was aware of the pipeline's location. He also recalls advising "someone" in the flotilla that the water depth at the wellsite was 255 feet. There was also testimony to the effect that Caillier mentioned, in radio communication to the tugs, which communication was relayed to the rig, that the rig was east of (i.e., had crossed) the pipeline.

15.

The gauge on the ROWAN ODESSA showing the depth to which the rig legs were extended was not in working order. McCary, using numerical markings which appear on each leg, applied a mathematical formula to determine the depth to which the legs were lowered. The ROWAN ODESSA was not equipped with a depth finder, but had, on occasion throughout the move, radioed the tug boats and requested depth readings. The tugs were equipped with fathometers.

There was considerable conflict in the testimony relative to the proper "formula" to be utilized in calculating the leg depth. Oliver testified that he didn't know how it was done; McCary testified that he had explained it to Oliver. McCary stated that one subtracted 39 feet from the number appearing on the rig legs; Dillman indicated at trial that one subtracted 28 feet, but admitted that his deposition testimony on this point was confused. McCary also stated that his mention in deposition of a 45 foot figure was "confused". He conceded, however, that assuming the legs

were lowered continuously starting at 10:30 p.m., they would be at a depth, at 1:00 a.m., of 251 feet. He testified, however, that there was an interruption in the lowering process of approximately 10 minutes duration.

16.

Though the testimony was conflicting on this point, the Court finds that, sometime between 11:30 p.m. and 12:15 a.m. on August 4 and 5, 1978, the flotilla arrived at a location approximately one mile north of the drillsite. McCary then directed the tugs to switch their towing positions and turn the rig so that it could approach the wellsite in a backwards position, in order that the rig's keyway would be directly over the wellsite.

It was while this "turn-around" was in progress that Chance surveyor Caillier boarded the rig and again asked rig personnel Oliver and McCary if they were aware of the pipeline's location. While Caillier testified that McCary responded by saying, "Let the tugs worry about the pipeline", Oliver testified that he did not recall McCary making this response.

17.

The process of lowering the legs, and the decision as to when to do so, was directed by McCary. Though again faced with much conflicting testimony, the Court finds that the leg lowering process could not have begun any later than 10:30 p.m., and, from the evidence presented, may have begun even earlier. This conclusion must result, despite the fact that the log kept by Captain Dillman indicated that the leg lowering did not begin until 11:00 p.m. This log also indicates, and several witnesses corroborated, that at 12:30

p.m., the rig legs had been extended to a depth of 247 feet. McCary testified that the legs were already extended 26 feet when the lowering process began.

Another area of inconsistent recall concerned the depth to which the legs were to be extended as the rig approached the wellsite. Those witnesses who were involved with the wellsite approach were under the impression (an impression created by McCary) that once the tug switch occurred, the legs were to be placed at, and remain, 40 feet off bottom until the rig was quite near the wellsite. Once the rig was somewhere between 200 feet and 1500 feet of the site (again, the recollection of witnesses varies), the legs were to be dropped to a distance of 10 feet off bottom. There was no clear evidence presented (indeed, no one seemed to know) exactly when this 30 foot drop occurred. Oliver and Sun Oil engineer Kathy Jo Hayes stated that they understood from McCary's comments on August 6, 1978, that the legs had remained at the 40 foot height above bottom until the rig was quite near the wellsite, but then also stated that McCary, in a confused fashion, had also mentioned lowering the legs to 10 feet off bottom once the tug switch was accomplished. At any rate, the moving log kept by Captain Dillman shows that, as of 12:30 a.m. on August 5, 1978, the legs were 10 feet off the bottom. Captain Dillman himself testified that the legs were placed 10 feet off the bottom when the rig was one half mile from the wellsite, and that the legs were jacked down continuously once that process was begun.

18.

The gauges measuring pressure on the Marathon pipeline registered a sudden drop sometime between 12:30 a.m. and 12:55 a.m. on August 5, 1978. The ROWAN ODESSA was the only deep draft vessel in the vicinity

at this time, and there was no vessel anchored in the area.

19.

At the point of rupture, the pipeline lay in 242-245 feet of water, and was slightly more than one mile north of the wellsite. The side scan sonar studies of the pipeline conducted by Chance on August 6, 1978, as well as the observations of those divers who examined the damaged pipeline, indicate that "prints" which correlate to the position and shape of the rig legs of the ROWAN ODESSA were found on the pipeline at the point of damage. These tracks cross the pipeline in a generally northwesterly to southeasterly direction at a point between the Marathon and Sun Oil platforms slightly more than one mile north of the proposed well location.

20.

Based on strong circumstantial evidence, the Court finds from a preponderance of all the evidence that the legs of the ROWAN ODESSA struck the Marathon pipeline on August 5, 1978, causing the damage which forms the basis of this complaint.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of this action as an admiralty and maritime claim, and venue is proper in the Eastern District of Louisiana.

II.

Inasmuch as Marathon's pipeline was properly laid, in accordance with required permits, Marathon is not guilty of any fault or neglect which contributed to the damage sustained by the pipeline. *Gray v. Joansson*, 287 F.2d 852 (5th Cir. 1961), *cert. denied*, 368 U.S. 835 (1961).

III.

In a case of this nature, where there can be no eyewitnesses to the event causing damage, the facts cannot be found with absolute certainty or beyond a reasonable doubt. The rights of the parties are determined by a preponderance of the evidence, and reliance upon circumstantial evidence which supports the inference of causation and negligence is permissible. *Petition of Potomac Sand and Gravel Co.*, 253 F.Supp. 268 (D.Md. 1966); *So. Pacific v. Commercial Transport Corp.*, 1967 S.M.C. 565 (E.D.La. 1966).

IV.

By virtue of their agreement with Rowan, which agreement was drafted by Rowan's general counsel John Magner, Sun Oil agreed to provide Rowan with a "guidepath" and access to the drilling site. Rowan contends that Sun Oil breached this obligation as the term "guidepath" speaks for itself and is clear and unambiguous. However, at trial no one was able to clearly define the term. Magner testified that he had not placed in the contract a definition of the term and, when asked to define it, he stated he could not. The only witness at trial who attempted to define the term was Rowan's Executive Vice-President Charles W. Yeargain. His definition indicated that, between two points, there were no obstructions. Testimony at trial, however, indicated that the Gulf of Mexico has many subsurface pipelines, and it would be all but impossible to move a drilling rig within the Gulf

without encountering such obstructions. Hence, it is apparent that the term "guidepath" as used in Section 4(c) of the agreement between Rowan and Sun Oil was ambiguous and did not clearly indicate the intent of the parties regarding the obligation thereunder. It follows that such an ambiguous contractual provision must be construed against the party which drafted the agreement. (Rowan). *Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge MR. CHARLIE,* 294 F.Supp. 1025 (E.D.La. 1968), *aff'd in part, rev'd on other grounds,* 424 F.2d 684 (5th Cir. 1970).

Accordingly, the Court is unable to find that Sun Oil failed to fulfill its contractual duty to provide Rowan with a "guidepath" and access to the drilling site.

In addition to furnishing Rowan with a "guidepath", Sun Oil agreed to advise Rowan of any subsurface conditions or obstructions which Rowan might encounter during operations under the agreement, survey and mark locations, and provide towing service. In fulfillment of these obligations, Sun Oil provided Rowan with a map showing the as-built location of the pipeline and Sun Oil's foreman, Oliver, had yet another chart aboard the rig showing the location of the pipeline relative to the proposed drilling site. In addition, Sun Oil engaged the services of Chance to survey and mark the drilling location and, prior to the rig's arrival on location, had Chance mark the exact location of the pipeline. Finally, Sun Oil assumed the cost of the tugs which were engaged by Rowan to tow the ROWAN ODESSA to the drilling site.

Thus, having found that Rowan was well aware of the existence and location of the Marathon pipeline relative to the wellsite, prior to the arrival of the ROWAN ODESSA on location, the Court concludes that Sun Oil fulfilled all

of its obligations under its agreement with Rowan and that Sun Oil was not negligent in the planning as opposed to the operational aspects of the rig move. *Contra, Transcontinental, supra.*

V.

In the instant case, a moving vessel, the ROWAN ODESSA, collided with a fixed subsurface object, the Marathon pipeline. When a moving vessel collides with an anchored vessel or a fixed object, there is a presumption the moving vessel is at fault, and the moving vessel bears the burden of rebutting this presumption by showing that it was without fault, or that the collision was caused by the fault of the stationary object, or that it was the result of inevitable accident. *The OREGON,* 158 U.S. 186, 197 (1895); *The CLARITA,* 90 U.S. (23 Wall) 1, 13 (1874); *Freeport Sulphur Co. v. S.S. HERMOSA,* 1974 A.M.C. 1315, 368 F.Supp. 952 (E.D.La. 1973), *aff'd in pertinent part,* 1977 A.M.C. 508, 526 F.2d 300 (5th Cir. 1976); *Transcontinental, supra.* The presumption of fault on the part of the ROWAN ODESSA in hitting the pipeline has not been overcome. Rowan, the claimant-owner of the ROWAN ODESSA, has not shown that the collision was the result of inevitable accident nor has it shown that the collision was caused by the fault of the stationary object. The fact that the collision occurred required Rowan as owner of the vessel to show that the vessel, and those in charge of her navigation, were without fault. *Transcontinental, supra.*

Turning to the drilling vessel ROWAN ODESSA, the Court has found that the gauge on the vessel showing the depth to which the legs were extended was not in working order during the rig move. This required McCary, her master, to use numerical markings which appear on each leg,

and to apply a mathematical formula to determine the depth to which legs were lowered. Also, the rig was not equipped with a fathometer which would indicate the water depth below the vessel. Thus, the rig, in order to determine the water depth, had to contact the tugs which were equipped with fathometers. However, considering the fact that the rig was being towed, and the towing hawser was approximately 1800 feet in length, the rig would only be advised as to the water depth below the tugs more than one quarter mile away. Therefore, unless the rig was constantly being advised as to the water depth, any attempt by the rig mover to extend the rig legs to a specific depth above the floor of the Gulf at any point would be based on speculation as to the actual water depth below the rig at a given time.

In considering the actions of McCary, the master of the ROWAN ODESSA, the Court concludes that he failed to fully inquire into the location of the pipeline as the rig was nearing the drilling location, notwithstanding the fact that he had in his possession a map showing the as-built location of the pipeline and that the pipeline was marked by the Chance buoys. Testimony indicated that he relied solely upon the siting of the rig within an imaginary "triangle" created by nearby platforms, and did not take special precautions under the circumstances, such as locating the Chance marker buoys or requesting that the Chance survey vessel, the GULF EXPLORER, keep the rig advised as to the pipeline's location.

The Court finds that McCary was also negligent in failing to inquire into the depth of the water at the point where the ROWAN ODESSA crossed the pipeline, approximately one mile north of the proposed drilling location. Testimony indicated that McCary requested that the captain of the EL ZORRO GRANDE inform the rig when the flotilla was

approximately one hour from location so the rig could begin lowering its legs. At approximately 10:30 p.m. the rig was so informed and, thereafter, McCary requested the EL ZORRO GRANDE to determine from the Chance survey vessel the water depth at the wellsite. McCary, however, did not request depth readings at the location where the rig began the jack-down procedure or at any location other than the wellsite, apparently assuming the depth between rig and the wellsite was the same as that at the wellsite (255 feet).

Finally, McCary was negligent in timing the lowering of the rig's legs and in not allowing a reasonable margin of safety relative to the depth to which the legs were to be lowered.

The Court has found that the pipeline lay in 242-245 feet of water at the point of rupture, which rupture occurred approximately one mile north of the wellsite sometime between 12:30 a.m. and 1:00 a.m. on the morning of August 5. Assuming that McCary began to lower the legs at 90 feet per hour at 10:30 p.m., as he testified, and that the vessel had a draft of 26 feet, the legs would, after continuous lowering, have reached a depth, at 1:00 a.m., of 244 feet. The vessel's moving log, however, indicates that, at 12:30 a.m., the legs were 10 feet off bottom at 287 feet "rack". According to Captain Dillman, the legs were then at a depth of 257 feet. Thus, although the testimony was conflicting as to the depth to which the legs were extended, in any event, the margin for safety at the point where the rig crossed the pipeline was 0, instead of the usual 10 to 15 feet.

For the reasons cited hereinabove, any of which, in the Court's opinion, constituted fault on the part of the drilling vessel ROWAN ODESSA and/or her master, McCary, the Court finds that Rowan as claimant-owner has failed

to rebut the presumption that its vessel was at fault in causing the collision with the pipeline and that McCary, her master, was negligent. Accordingly, such fault on the part of the ROWAN ODESSA and those in charge of her navigation was the sole proximate cause of the damage to the Marathon pipeline.

VI.

Plaintiff has named as defendants Tidewater and Twenty Grand, as owner/operator of the three vessels engaged with towing the ROWAN ODESSA to the wellsite. Based on the evidence heard at trial and the applicable law, the Court is convinced that the towing vessels were in no way a contributing proximate cause of the collision with the Marathon pipeline. Virtually every witness testified that the tugs' behavior and navigation were commensurate with that level of care and expertise required of similarly situated towing vessels. It was also generally conceded that the tugs were directed by and subject to the orders of the rig manager, McCary. While the tugs were responsible for the safe conduct of the rig over water to the wellsite, they did not control or direct the movement of the rig's legs. At all times pertinent, the tugs were operating under the direction of McCary. As a result, they cannot be considered the "dominant mind" over their tow.

The "dominant mind" concept was developed to impose liability for a collision on the towing vessel for its faults in navigation, even though the tow may have contributed to the accident. The tug is generally considered the "dominant mind", since it provides the motive power. When, however, the collision is the result of a duty breached by the tow, and not the result of some fault or omission of the tug, the tow may be held solely liable for resulting damages.

Gilmore & Bloack, *The Law of Admiralty* (2d Ed. 1975), p. 516; *Chevron U.S.A., Inc. v. Progress Marine, Inc.*, 1980 A.M.C. 1637, *aff'd*, 632 F.2d 893 (5th Cir. 1980). *See also Dow Chemical Co. v. Tug THOMAS ALLEN*, 394 F.Supp. 1354 (E.D.La. 1972), wherein it was stated:

> If the tow is the "dominant mind", the tug is not liable provided the tug has obeyed the tow's orders and has not herself been guilty of negligence, either in the manner of executing the orders or by participating in an obviously dangerous maneuver.

Dow Chemical, supra at 1363.

The tugs supplied depth readings to the ROWAN ODESSA throughout most of the move. Though the testimony was somewhat unclear as to whether the tugs possessed a pipeline chart onboard, it appears that they did not. While sailing without a chart may render a vessel unseaworthy, the Court concludes that under the facts of this case, the failure of Tidewater and/or Twenty Grand to supply pipeline charts to the tugs was not the proximate cause of the casualty. *Dow Chemicals, supra.* Nor was the tug's relay to the rig of the Chance observation that the flotilla was east of the pipeline a proximate cause of the collision. The tugs were not requested nor under a duty to provide the rig with constant depth readings or to evaluate another party's knowledge of the flotilla's location relative to the pipeline. Rig personnel did not ask the tugs for depth readings or a navigational fix when they crossed the pipeline, as they had at other times during the move. The tugs were aware of the pipeline's presence, but, as numerous witnesses testified, the tugs were not responsible for, or in any way involved in the decision to lower the rig legs. At all times pertinent, the tugs exercised that degree of caution, care

and maritime skill which prudent navigators usually employ in similar undertakings. *United States Fire Insurance Co. v. Gulf States Marine & Mining Co.*, 262 F.2d 565 (5th Cir. 1959); *Chitty v. M/V VALLEY VOYAGER*, 284 F.Supp. 297 (E.D.La. 1968).

VII.

Plaintiff has also named as defendant Chance, the surveyor engaged by Sun Oil to buoy both the drilling location and the Marathon pipeline. Based on the testimony at trial, the Court concludes that Chance performed those services requested of it under its contract with Sun Oil in accordance with the "highest standards" in the industry. The services requested of it were: 1) to buoy the location of the well, and 2) to mark the Marathon pipeline west of location. The surveys undertaken subsequent to the pipeline rupture indicated that the three buoys placed over a 3000 foot area west of the location were placed over the pipeline. The buoy marking the wellsite location was also accurately placed.

It is clear from the testimony at trial that those aboard the rig did not expect the surveyor to "direct" the rig onto location, or to mark the pipeline at the point of crossing. In addition, there was much testimony indicating that the "missing map" aboard the rig was marked to show the three points at which the Chance buoys designated the pipeline. Caillier, the Chance surveyor, when requested by Rowan, provided the rig with the water depth at location. He was not, however, requested to determine the depth at the point where the rig crossed the pipeline.

Thus, Chance, as a service company, did what it was asked to do. It was not required or under a duty to warn an experienced contractor, such as Rowan, of dangers which

Rowan could be presumed to be familiar with, especially in light of Rowan's knowledge of the existence of the pipeline. *Waterbury v. Byron Jackson, Inc.*, 576 F.2d 1095 (5th Cir. 1978). Further, any negligence which the Chance crew may have committed was not a proximate cause of the damage to the pipeline. McCary's reliance upon a comment radioed by Caillier to the tug boats and which was relayed to McCary, to the effect that the rig was east of the pipeline, was misplaced. Notwithstanding this comment, however, it was the leg lowering process directed by McCary and prior to the Chance comment which ultimately caused the damage to the pipeline. Caillier asked rig personnel on at least two different occasions whether they were aware of the existence of the pipeline. The responses were affirmative and rig personnel requested no additional assistance.

VIII.

The court has reviewed the numerous allegations made by Rowan as to the fault of defendants and cross-defendants, Twenty Grand, Tidewater and Chance. However, such allegations have been found to be without merit.

Thus, having determined that Rowan was negligent and that such negligence was the proximate cause of the damage to the Marathon pipeline, the Court now focuses on Rowan's claims for indemnity.

IX.

In the contract between Sun Oil and Rowan, the indemnity provision appearing in Section 9(f)(2) (see Findings of Fact) provides that the Operator (Sun Oil) will indemnify Contractor (Rowan) against all claims arising "*in favor of Operator's employees, Operator's contracators or their*

employees,...on account of bodily injury, death or damage to property". (Emphasis supplied). Since the Court has determined that Rowan is the only party whose negligence caused the damage complained of, and since the claims of Tidewater, Twenty Grand and Chance for indemnity were premised upon the possibility that they might also be found negligent, the Court finds these provisions inoperable. Further, the indemnity provision clearly does not apply to any claim by Rowan for indemnity from Sun Oil based upon the negligence of Rowan. Finally, the contract and indemnity provisions are silent as to indemnity in the event of damage to the property of third parties, such as Marathon. Thus, the Court concludes that Rowan is not entitled to indemnity from Sun Oil pursuant to their contractual obligations.

X.

Rowan argues that it may claim indemnity from Chance under the terms of the following indemnity provision contained in the contract between Sun Oil and Chance:

> INDEMNITY: Contractor [Chance] agrees to protect, defend, indemnify and hold Sun [Sun Oil] and *those* who are joint adventurers, partners, co-owners of the property, or *otherwise associated with Sun in receiving the benefits of the work or services to be rendered or performed hereunder,* and the employees of Sun and of such associates of Sun, free and harmless from and against any and all claims, demands and causes of action of every kind and character from any cause whatsoever by any party hereto, any party acquiring any interest hereunder, any of their agents and employees, and any third or other party whomsoever, or governmental agency, arising out of, incident to, or in connection with this agreement or performance of work or services thereunder or breach of the terms,

> thereof, including without limitation by enumeration all taxers, claims, debts, fines, penalties, forfeitures, patent infringements, loss of use, death, injury and damages to all persons and property, together with the amount of judgments, penalties, interest, court costs, legal and other fees and expenses in connection therewith, regardless of whether the liability therefor is based upon some alleged act or omission of Sun or of Contractor or of some other party.

(Emphasis supplied).

Specifically, Rowan argues that it may claim indemnity from Chance as one who received "benefits of the work or services to be rendered or performed hereunder". The Court rejects this contention. The obligation to indemnify is to be strictly construed, and the status of indemnitee is also interpreted narrowly. *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel Margaret,* 441 F.Supp. 1 (E.D.La. 1975), *aff'd,* 565 F.2d 958 (5th Cir. 1978). Additionally, an indemnity agreement will be held to benefit a particular party only when it is express in that effect, and reflects the clear intent of the parties. *Day v. Odeco,* 353 F.Supp. 1350 (E.D.La. 1973). The Court is not convinced that the above-quoted language expresses the clear intent of the parties [Sun Oil and Chance] to indemnify a contractor such as Rowan for its [Rowan's] own negligence. Rather, the provision when taken as a whole indicates that the phrase "those...otherwise associated with Sun in receiving the benefit..." would include those persons associated or affiliated with Sun Oil enjoying the benefit of the work being performed rather than the contractors such as rowan who are actually performing the work contracted for. Thus, the Court concludes that Rowan is not entitled to indemnity from Chance pursuant to the contract between Sun Oil and Chance.

Accordingly, IT IS ORDERED that judgment be entered in accordance with this opinion in favor of plaintiff, Marathon Pipe Line Company, and in favor of defendants, Sun Oil Company, Sun Gas Company, John E. Chance and Associates, EL ZORRO GRANDE, EL JAGUAR GRANDE, LEOPARDO GRANDE, *in rem*, Twenty Grand Offshore, Inc., and Tidewater Marine Service, Inc., *in personam*, and against defendant ROWAN ODESSA, *in rem*, and Rowan Companies, Inc., *in personam*. All cross-claims are hereby dismissed, with the amount of damages to be established by Marathon at a subsequent trial of that issue, if parties are unable to stipulate to same.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
November 24, 1981

APPENDIX "D"

PROCEEDINGS

THE COURT: Are counsel ready?

MR. READ: Plaintiff is ready.

THE COURT: Would you please enter an appearance for the record, Mr. Read.

MR. READ: For the plaintiff, Marathon, Henry Read and Gordon Grant of Montgomery, Barnett, Brown & Read.

MR. BLAZEK: For the Rowan Companies, Jim Blazek, Mr. Ernest Carrere, Alan Zaunbrecher, Jim Wright.

MR. BIENVENU: For Sun Oil Company of Delaware, Albert Bienvenu, Jr. and John McAuliffe.

MR. HEALY: May it please the Court, for Tidewater and Twenty Grand, George Healy and Richard Dicharry.

MR. STEEN: For John Chance & Associates, Charles Steen and Larry Roedel.

THE COURT: Okay, gentlemen. Do you wish the witnesses sequestered?

MR. READ: Yes, your Honor.

MR. STEEN: We would ask that they be sequestered, and I notice that Rowan Company has Mr. McCary sitting here, apparently as a representative. He's not an officer or representative of the company, and I would suggest that

he ought to be sequestered, too.

MR. BLAZEK: We intend to have Mr. McCary here as the client representative in order to assist us in the trial of this case.

THE COURT: Will he testify?

MR. BLAZEK: Yes, sir, he will.

MR. STEEN: He is a key witness, your Honor.

MR. BIENVENU: I join in the objection.

THE COURT: What is his position with the corporation?

MR. BLAZEK: He is the rig manager. That's his official title.

THE COURT: This particular rig, the rig in question?

MR. BLAZEK: Yes, your Honor.

THE COURT: I'm going to order him sequestered until he testifies. All persons who are going to testify in this cause please repair to the hallway and remain there until you are called, and do not discuss this case amongst yourselves while you're waiting to testify.

82-1919

NO.

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FILED
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ALEXANDER L. STEVAS
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1982

MARATHON PIPELINE COMPANY
Respondent,

versus

ROWAN COMPANIES, INC. and
DRILLING RIG ROWAN/ODESSA,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
VOLUME II—APPENDIX E

JAMES E. BLAZEK
ALAN A. ZAUNBRECHER
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234
Attorneys for Petitioner

ERNEST A. CARRERE, JR.
JAMES E. WRIGHT, III
Jones, Walker, Waechter,
Poitevent, Carrere & Denegre
225 Baronne Street, 28th Floor
New Orleans, LA 70112
(504) 581-6641
Attorneys for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

APPENDIX "E"

List of Parents, Subsidiaries and Affiliates of Petitioner, Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA

Pursuant to Rule 28.1 of the Rules of the United States Supreme Court, petitioner herein submits a complete list of all parents, subsidiaries and affiliates of Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA.

1. Aber Uschill, Ltd.
2. Compania Perforadora la Marde Arabe, S.A.
3. ERA Helicopters, Inc.
4. ERA Aviation (Carib), Inc.
5. ERA Aviation Center, Inc.
6. Marine & Aviation Risks, Ltd.
7. Munger Moore & Associates, Inc.
8. N.Z.D. Noord Zee Drill, B.V.
9. Perforadora Guerrero Negro, S.A.D.E. C.V.
10. RDC Perfuracoes Maritimas do Brasil, Ltda.
11. Rowan Aviation & Marine, Ltd.
12. Rowan Drilling, U.S. (An Operating Division)
13. Rowan Drilling (U.K.), Ltd.
14. Rowan Marine Drilling, Inc.
15. Rowan (NOR-101), Inc.
16. Rowan (NOR-102), Inc.
17. Rowan Petroleum, Inc.
18. Rowan Petroleum Phillipines, Inc.
19. Rowan Petroleum (U.K.), Ltd.
20. RDC Marine, Inc.
21. Rowandrill, Inc.
22. Rowan International, Inc.
23. Universal Aviation & Marine Risks, Ltd.

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NO. 82-1919

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FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARATHON PIPELINE COMPANY

Respondent,

VERSUS

ROWAN COMPANIES, INC.
and DRILLING RIG ROWAN/ODESSA

Petitioner

ON PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GENE W. LAFITTE
CHARLES M. STEEN
LARRY M. ROEDEL
Liskow & Lewis
50th Floor, One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-7979

Attorneys for Respondent,
John E. Chance & Associates,
Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

1. Whether the District Court's sequestration of a fact witness who was not an employee of petitioner violated the provisions of Rule 615 of the Federal Rules of Evidence and, if so, whether petitioner was denied due process of law pursuant to the Fifth Amendment to the Constitution of the United States.

LIST OF INTERESTED PARTIES

Counsel of record for John E. Chance & Associates, Inc. certify that the following listed parties have an interest in the outcome of this case. These representations are made in order for the Justices of this Court to evaluate possible disqualification or recusal.

1. Marathon Pipeline Company, represented by Henry J. Read and A. Gordon Grant, Jr. of Montgomery, Barnett, Brown & Read, 1800 First NBC Building, New Orleans, LA 70112

2. Sun Oil Company and Sun Gas Company, represented by P. Albert Bienvenu, Jr. and John E. McAuliffe, Jr. of Bienvenu, Foster, Ryan & O'Bannon, 200 Carondelet Street, New Orleans, LA 70130.

3. Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA, represented by James E. Blazek and Alan A. Zaunbrecher of Adams & Reese, 4500 One Shell Square, New Orleans, LA 70139, and Ernest A. Carrere, Jr. and James E. Wright, III of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, LA 70112.

4. Twenty Grand Offshore, Inc., Tidewater Marine Services, Inc., the tug EL ZORRO GRANDE, the tug EL JAGUAR GRANDE, and the tug LEOPARDO GRANDE, represented by George W. Healy, III and Richard N. Dicharry of Phelps, Dunbar, Marks, Claverie & Sims, 1300 Hibernia Bank Building, New Orleans, LA 70112.

5. John E. Chance & Associates, Inc., represented by Gene W. Lafitte, Charles M. Steen and Larry M. Roedel of Liskow & Lewis, 50th Floor, One

Shell Square, New Orleans, LA 70139.[1]

[1] The complete list of parent, subsidiary and affiliate companies of John E. Chance & Associates, Inc. as required by Rule 28.1 of the Rules of the United States Supreme Court is: Survey Boats, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MARATHON PIPELINE COMPANY,

Respondent,

VERSUS

ROWAN COMPANIES, INC.
and DRILLING RIG ROWAN/ODESSA,

Petitioner,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Judgment of the United States District Court for the Eastern District of Louisiana appears in Appendix A and is reported at 527 F.Supp. 824 (E.D. La. 1981).

The decision of the United States Court of Appeals for the Fifth Circuit affirming the District Court's Judgment appears in Appendix B, and is reported at 699 F.2d 240 (5th Cir. 1983).

The decision and Order of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing appears in Appendix C.

JURISDICTION

The jurisdiction of the United States Supreme Court was invoked by petitioner pursuant to 28 U.S.C. 1254(1).

This Opposition to Petition for Writ of Certiorari is being filed within thirty (30) days after receipt of the Petition for Writ of Certiorari as required by Rule 22 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Rule 615 of the Federal Rules of Evidence—

Rule 615. Exclusion of Witnesses

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence as shown by a party to be essential to the presentation of his cause.

2. The Fifth Amendment to the Constitution of the United States—

> No person shall be held to answer for a capital,

or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Suit was instituted by Marathon Pipeline Company in the United States District Court for the Eastern District of Louisiana pursuant to the General Maritime Law and the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b), in accordance with Rule 9(h) of the Federal Rules of Civil Procedure, to recover damages as a consequence of a rupture to its pipeline offshore Louisiana, on August 5, 1978. Suit was instituted against Rowan Companies, Inc., Drilling Rig ROWAN/ODESSA, Tug EL ZORRO GRANDE, Tug EL JAGUAR GRANDE, M/V LEOPARDO GRANDE, Sun Oil Company, Sun Gas Company, Inc., John E. Chance & Associates, Inc., Twenty Grand Offshore, Inc., and Tidewater Marine Service, Inc. The issues of liability and damages were bifurcated, and trial without a jury on the sole issue of liability was conducted on January 14-16, 1981. The District Court entered its Opinion on November 30, 1981 and subsequently rendered Judgment on December 1, 1981, finding petitioner, Rowan Companies, Inc. and its Drilling Rig ROWAN/ODESSA, solely liable to Marathon Pipeline Company. All other defendants were dismissed.

At the commencement of trial, a motion was made to sequester all witnesses. On specific motion of counsel for respondent, John E. Chance & Associates, Inc., the Court excluded Mr. Robert McCary, the rig manager of the ROWAN/ODESSA, who was scheduled to testify. The Court also excluded an employee of respondent, Sun Oil Company, who was to testify. (Appendix D-pp. 4-6 of the Transcript Record of the District Court). Mr. Robert McCary was not employed by petitioner, Rowan Companies, Inc., but rather was employed by a related company, Rowan International, which was not a party to the suit. (Appendix E-p. 539 of the Transcript Record of the District Court).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and included a contention that the District Court committed reversible error in sequestering Mr. Robert McCary, for the reason that his exclusion violated Rule 615 of the Federal Rules of Evidence. The Court of Appeals affirmed the District Court Judgment, and also denied the Petition for Rehearing.

ARGUMENT IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE DISTRICT COURT ACTED PROPERLY WHEN IT SEQUESTERED ALL FACT WITNESSES, PARTICULARLY ONE WHO WAS NOT AN EMPLOYEE OF A PARTY, AND SUCH ACTION DID NOT CONTRAVENE FEDERAL RULE OF EVIDENCE 615 OR THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

In its *per curiam* decision, the United States Court of Appeals for the Fifth Circuit delineated three bases for its

affirmance of the District Court Opinion. (See Appendix B.)

The second basis relied on by the Fifth Circuit is dispositive on its face of the Petition for Writ of Certiorari. As noted by the Court, Mr McCary "was not an employee of the Rowan Companies, Inc., the party to the proceedings." The subject Rule expressly states that exclusion of..." (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney...." is not authorized. No basis exists for suggesting that a non-employee has an absolute right to sit at counsel table. It has previously been recognized that a former owner of a party corporation does not fit within the exception of Rule 615(2), *Varlack v. S.W.C. Caribbean, Inc.*, 550 F.2d 171 (3rd Cir. 1977). It therefore follows that a present employee of a separate, although related, corporation does not fall within the exception.

Prejudice is a necessary ingredient to justify a reversal of the District Court decision pursuant to Rule 615. *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978), *cert. denied*, 446 U.S. 956, 100 S.Ct. 2928 (1980); *Government of Virgin Islands v. Edinborough*, 625 F.2d 472 (3rd Cir. 1980); *NLRB v. Hale Manufacturing Co.*, 570 F.2d 705 (8th Cir. 1978). As noted by the Fifth Circuit, at no time during the course of the trial did petitioner suggest disapproval of the District Court's exclusion of Mr. McCary, and at no time was a suggestion or showing made that the ruling was ultimately prejudicial. In fact, the District Court sequestered all fact witnesses, including an employee of another party (see Appendix D—p. 6 of the Transcript Record of the District Court). No party was given an advantage over another and, certainly, the ultimate outcome was not affected by the exclusion of *all* witnesses.

Petitioner has suggested both evidentiary and constitutional arguments in support of its position. Normally, in such case, the non-constitutional issues should be addressed first to avoid reaching the constitutional issue. *Blum v. Bacon*, 457 U.S. 132, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). However, no need exists to address the "due process" issue here since the question raised by petitioner can be resolved by a simple interpretation of Federal Rule of Evidence 615. Moreover, petitioner was not denied access to counsel as was the case in *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78 (1980), cited by petitioner. It was adequately represented at trial and no suggestion is made that its officers could not consult with counsel. Like its belated contention that it was prejudiced, petitioner's suggestion that it was denied due process comes too late and is without merit.

CONCLUSION

For the foregoing reasons, Rule 615 of the Federal Rules of Evidence was not violated. Therefore, petitioner's contention that it was denied due process is also without merit. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Gene W. Lafitte
Charles M. Steen
Larry M. Roedel
LISKOW & LEWIS
50th Floor, One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-7979

Attorneys for John E. Chance
& Associates, Inc.

PROOF OF SERVICE AND CERTIFICATE OF BAR MEMBER

I, Gene W. Lafitte, counsel of record for John E. Chance & Associates, Inc., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of June, 1983, I served by hand, three (3) copies each of the foregoing Opposition to Petition for Writ of Certiorari on all parties required to be served pursuant to Rule 28 of the rules of the United States Supreme Court, namely, as follows:

James E. Blazek, representing
Rowan Companies, Inc. and the
Drilling Rig ROWAN/ODESSA
Adams & Reese
4500 One Shell Square
New Orleans, Louisiana 70139

Henry J. Read, representing
Marathon Pipeline Company
Montgomery, Barnett, Brown & Read
1800 First N.B.C. Building
New Orleans, Louisiana 70112

P. Albert Bienvenu, Jr., representing
Sun Oil Company and Sun Gas Company
Bienvenu, Foster, Ryan & O'Bannon
200 Carondelet Street
New Orleans, Louisiana 70130

George W. Healy, III, representing
Twenty Grand Offshore, Inc.,
the tug EL ZORRO GRANDE,
the tug EL JAGUAR GRANDE,
the tug LEOPARDO GRANDE
Phelps, Dunbar, Marks, Claverie & Sims
Hibernia Bank Building

New Orleans, Louisiana 70112.

GENE W. LAFITTE
Liskow & Lewis
50th Floor, One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-7979

Attorneys for John E. Chance
& Associates, Inc.

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARATHON PIPE LINE COMPANY	CIVIL ACTION
VERSUS	NO. 79-403
DRILLING RIG ROWAN/ODESSA, ET AL.	SECTION "K"

OPINION

Plaintiff, Marathon Pipe Line Company ("Marathon"), owner of an eight-inch oil pipeline installed on the floor of the Gulf of Mexico, has brought this suit in admiralty seeking compensation for damage sustained by a portion of the pipeline on August 5, 1978. Defendants are the Drilling Rig ROWAN ODESSA ("ROWAN ODESSA"), *in rem*, and its owner, Rowan Companies, Inc. ("Rowan"), the Tugs EL ZORRO GRANDE ("EL ZORRO"), EL JAGUAR GRANDE ("EL JAGUAR"), LEOPARDO GRANDE ("LEOPARDO"), *in rem*, their owner, Twenty Grand Offshore, Inc. ("Twenty Grand"), their operator, Tidewater Marine Service, Inc. ("Tidewater"), Sun Oil Company ("Sun Oil"), Sun Gas Company ("Sun Gas"), and John E. Chance & Associates, Inc. ("Chance").

Defendants deny liability. Defendants Sun Oil and Sun Gas have cross-claimed against all of the defendant vessels and the other defendants. Defendants Twenty Grand and Tidewater have cross-claimed against defendants Chance and Rowan. Defendant Rowan has cross-claimed against the three defendant tugs, Chance, Twenty Grand, Tidewater and Sun Oil. Defendant Chance has cross-claimed against all defendant vessels and all other defendants.

The matter came on for trial on January 14, 1981, and considered solely the issue of liability; the issue of quantum was reserved. The parties filed post-trial briefs, and the matter was taken under submission. Having thoroughly reviewed the evidence, the memoranda filed by counsel, and the applicable law, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1.

At all times pertinent, plaintiff Marathon, a corporation organized under the laws of the State of Delaware, was the owner of an all-welded, seamless, eight-inch diameter submerged oil pipeline. This pipeline ran in a northeast direction, between the Sun Oil "A" platform in East Cameron Block 338 and the Marathon "A" platform in East Cameron Block 321. It extended a distance of 7.34 miles and was constructed and installed on the floor of the Gulf of Mexico in accordance with all permits required by law. The water depth at the northern end of the pipeline ("Block 321") was approximately 210 feet and at the southern end ("Block 338") was approximately 260 feet.

2.

At all times pertinent, defendant Sun Oil was a corporation organized under the laws of the State of Delaware and, on August 4, 1978, was the operator of a lease in East Cameron Block 331. However, Sun Oil had previously obtained the necessary rights to directionally drill a well from East Cameron Block 330 into Block 331 at a proposed location approximately 1500 feet to the east of the Marathon pipeline since the East Cameron Block 331 location was

within a shipping fairway.

3.

On July 31, 1978, Sun Oil contracted with Rowan, a corporation organized under the laws of the State of Delaware, to furnish the ROWAN ODESSA to drill the proposed well. The contract between the parties was prepared by Rowan.

4.

Under the terms of its contract with Rowan, (entitled "Agreement"), Sun Oil agreed to: provide Rowan with a "guidepath" and access to the drillsite location, advise Rowan of any subsurface conditions or obstructions which Rowan might encounter during operations under the agreement, survey and mark locations, and provide towing service.

5.

The contract between Sun Oil and Rowan contained, among other, the following provisions:

> 8. *(b) Operator of Drilling Unit.*
>
> **Contractor shall be solely responsible for the operation of the Rig, including, without limitation, supervising moving operations, positioning on drilling locations as required by Operator, jacking up and jacking down operations, as well as such operations on board the Rig as may be necessary or desirable for the safety of the Rig. Operations under this Agreement will be performed on a 24-hour day basis.**

9. (f) *Indemnity Provisions.*

(1) *Contractor's [Rowan's] Indemnification of Operator [Sun].*

Contractor agrees to protect, defend, indemnify and save Operator and its joint owners harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Contractor's employees, Contractor's subcontractors or their employees, on account of bodily injury, death or damage to property ....

(2) *Operator's Indemnification of Contractor.*

Operator agrees to protect, defend, indemnify and save Contractor harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Operator's employees, Operator's contractors or their employees, other than those identified in 9(f)(1) above, on account of bodily injury, death or damage to property...

12. *Independent Contractor.*

Contractor is an independent Contractor. Neither Contractor, its employees, subcontractors or their employees, are agents or employees of Operator. The entire performance, operations management and control of the Rig and other items of Contractor's equipment shall be under the exclusive control and command of Contractor, and shall be carried out by Contractor with the primary purpose of performing all acts necessary to execute the

work required by the Operator's drilling program for each well, consistent with safety. It shall be the sole exclusive duty of Contractor to determine at all times, whether operations can be safely continued or undertaken, including, without limiting the generality of the foregoing, the duty to determine by Contractor's own inspection that all cargo and items of equipment are loaded and stored in a proper manner and the Rig is suitable to undertake any contemplated operation under the then existing conditions.

6.

In order to determine whether any underwater obstructions existed in the area, Sun Oil relied on information received from Clark Oil Company ("Clark"), which information was compiled by Clark in December of 1976. Sun Oil provided Rowan with a map showing the as-built location of the pipeline; however, the map was lost prior to trial and was never admitted into evidence. Sun Oil engaged the services of Chance to survey and mark the drilling location. In addition, prior to the arrival of the ROWAN ODESSA at the drilling location, Chance, as requested by Sun Oil, placed three (3) marking buoys along the Marathon pipeline, so as to identify its location. Finally, Sun Oil, pursuant to Schedule E(2) of its agreement with Rowan, assumed the cost of the tugs engaged by Rowan to tow the ROWAN ODESSA to location.

7.

The ROWAN ODESSA is a jack-up drilling vessel, official number 579021, measuring 247 feet in length, 200 feet in width, with a hull depth of 26 feet. It has three retractable legs, 410 feet in length, which can be raised or lowered

at a constant rate of 90 feet per hour.

The vessel is not self-propelled and must be towed by other vessels. When being moved, she is under the command of a Rowan employee, variously referred to as the "rig mover" or "rig manager". At all times pertinent, the rig mover was R. G. McCary.

8.

Under the terms of its agreement with Sun Oil, Rowan agreed to: carry out all operations under the agreement with due diligence, in a safe, workmanlike manner and be solely responsible for the operation of the rig, including, without limitation, *supervising moving operations, positioning on drilling locations as required by Operator, jacking-up and jacking-down operations.* (Emphasis supplied).

9.

On August 2, 1978, Rowan contacted Tidewater, requesting three tugs to tow the ROWAN ODESSA from a drillsite off of the Texas Coast to East Cameron Block 330. The towing expense was assumed by Sun Oil pursuant to its agreement with Rowan.

At all times pertinent, the three tugs towing the ROWAN ODESSA to its location in East Cameron Block 330, the EL JAGUAR GRANDE, EL ZORRO GRANDE and LEOPARDO GRANDE, were diesel-powered, documented, ocean-going vessels, owned by defendant Twenty Grand and operated by defendant Tidewater. Pursuant to the contract between Sun Oil and Rowan, and through the use of the three tugs, the ROWAN ODESSA, under McCary's command, was put under tow toward the

designated drillsite on August 3, 1978.

10.

At all times pertinent, defendant Chance was a corporation organized and doing business under the laws of the State of Louisiana.

Sun Oil contracted with Chance for surveying services, and on July 28, 1978, requested that Chance buoy the drilling site. On August 4, 1978, while the ROWAN ODESSA was in tow toward the drilling location, Sun Oil also requested that Chance place marker buoys on the pipeline which was located approximately 1500 feet west of the proposed drillsite. On that date, Chance marked the well location, placed two reference buoys to the northeast and northwest of the site, and placed three buoys on the pipeline directly west of the site.

The three buoys marking the pipeline west of the wellsite were placed at 1500 foot intervals. One was placed due west of the site while the remaining two buoys were placed 1500 feet northeast and southwest of the first buoy. Subsequent surveys indicated that the wellsite and pipeline buoys were placed within expected tolerance limits. Each buoy consisted of one cubic foot piece of styrofoam, topped with an eight-foot cane pole. Attached to each pole was a six-volt battery, non-flashing bulb, and a small black and white flag.

The request to buoy the pipeline was transmitted by telephone from Sun Oil to Chance after the Chance surveyors were offshore. As a result, Chance, in its office, made the calculations necessary to locate the pipeline and radioed the information to its offshore crew.

11.

On board the ROWAN ODESSA during the move was Rowan rig mover, McCary, Rowan toolpusher Lindsey Rogers, Captain Dillman, the rig's marine hull underwriters' representative, Sun Oil's drilling foreman, Richard Oliver, and the Rowan crew. McCary as rig mover was in command of the vessel, while Oliver's duties involved checking the rig's inventory and equipment used for drilling. Although Oliver was responsible for seeing that the rig was properly located on the wellsite, he had nothing to do with with lowering of the rig's legs, or with moving the vessel toward location.

On or about August 2, 1978, Sun Oil obtained from Marathon a map showing the as-built location of the pipeline and its proximity to the drilling location. This map disappeared from the rig after the pipeline was damaged and was never found. It therefore was not produced for trial. On or about August 4, 1978, Sun Oil sent the map to the rig by helicopter, for use by rig personnel. This map was reviewed by McCary, Captain Dillman and Oliver, in the course of the rig move. Oliver testified that, in addition to this map, he had on board yet another chart, which also mysteriously vanished and which also showed the wellsite and its proximity to the pipeline. Oliver testified that the pipeline was shown on their maps as running from the southwest to the northeast, while Dillman and McCary testified that the pipeline appeared to run north to south.

There was considerable testimony concerning the reliance of McCary, Dillman and Oliver upon the siting of the rig inside of a "triangle", created by the Sun Oil, Marathon and Aminoil platforms. The Marathon platform in Block 321 was north of the wellsite while the Sun platform

in Block 330 was southwest of the site. The Aminoil platform was located northeast of the drillsite. Oliver stated that he considered the location of these platforms as visual indicia of an imaginary "triangle" of safety. If the rig was inside of this triangle, it would not contact the pipeline.

The Court finds that the Rowan employees onboard the ROWAN ODESSA and responsible for moving the rig were well aware of the presence of the Marathon pipeline long before arriving at the proposed drillsite.

13.

At approximately 8:00 p.m. on August 4, 1978, the captain of the EL ZORRO GRANDE, Otis Wisdom, was contacted by McCary, who requested that the rig receive one hour's notice prior to arrival in the vicinity of the location so that the rig could begin lowering its legs. At approximately 10:30 p.m., Wisdom informed the rig that the flotilla was approximately one hour from "location", that is, from Block 330. Wisdom was also informed that the "jacking-down" rate of the rig's legs was one and a half feet per minute; he was requested to determine, from the survey boat, what the water depth was at the wellsite. The tug then relayed a depth reading, provided by the survey boat to the rig, of 255 feet. This figure is contrasted with the 249 foot reading which appeared on the Sun Oil "Drilling Program".

The lead tug decided that the flotilla would enter the block to the north, rather than directly to the west of the wellsite. Several witnesses agreed that such an approach would be customary, under these circumstances, to avoid "wiping out" the location buoy.

14.

Chance surveyor Caillier was aboard the Chance survey boat, GULF SURVEYOR, and in radio communication with the rig and its tug boats when the flotilla was several hours away from the wellsite. He communicated to the flotilla that a pipeline was in the vicinity of the wellsite and was told by McCary that he, McCary, was aware of the pipeline's location. He also recalls advising "someone" in the flotilla that the water depth at the wellsite was 255 feet. There was also testimony to the effect that Caillier mentioned, in radio communication to the tugs, which communication was relayed to the rig, that the rig was east of (i.e., had crossed) the pipeline.

15.

The gauge on the ROWAN ODESSA showing the depth to which the rig legs were extended was not in working order. McCary, using numerical markings which appear on each leg, applied a mathematical formula to determine the depth to which the legs were lowered. The ROWAN ODESSA was not equipped with a depth finder, but had, on occasion throughout the move, radioed the tug boats and requested depth readings. The tugs were equipped with fathometers.

There was considerable conflict in the testimony relative to the proper "formula" to be utilized in calculating the leg depth. Oliver testified that he didn't know how it was done; McCary testified that he had explained it to Oliver. McCary stated that one subtracted 39 feet from the number appearing on the rig legs; Dillman indicated at trial that one subtracted 28 feet, but admitted that his deposition testimony on this point was confused. McCary also stated that his mention in deposition of a 45 foot figure was "confused". He conceded, however, that assuming the legs

were lowered continuously starting at 10:30 p.m., they would be at a depth, at 1:00 a.m., of 251 feet. He testified, however, that there was an interruption in the lowering process of approximately 10 minutes duration.

16.

Though the testimony was conflicting on this point, the Court finds that, sometime between 11:30 p.m. and 12:15 a.m. on August 4 and 5, 1978, the flotilla arrived at a location approximately one mile north of the drillsite. McCary then directed the tugs to switch their towing positions and turn the rig so that it could approach the wellsite in a backwards position, in order that the rig's keyway would be directly over the wellsite.

It was while this "turn-around" was in progress that Chance surveyor Caillier boarded the rig and again asked rig personnel Oliver and McCary if they were aware of the pipeline's location. While Caillier testified that McCary responded by saying, "Let the tugs worry about the pipeline", Oliver testified that he did not recall McCary making this response.

17.

The process of lowering the legs, and the decision as to when to do so, was directed by McCary. Though again faced with much conflicting testimony, the Court finds that the leg lowering process could not have begun any later than 10:30 p.m., and, from the evidence presented, may have begun even earlier. This conclusion must result, despite the fact that the log kept by Captain Dillman indicated that the leg lowering did not begin until 11:00 p.m. This log also indicates, and several witnesses corroborated, that at 12:30

p.m., the rig legs had been extended to a depth of 247 feet. McCary testified that the legs were already extended 26 feet when the lowering process began.

Another area of inconsistent recall concerned the depth to which the legs were to be extended as the rig approached the wellsite. Those witnesses who were involved with the wellsite approach were under the impression (an impression created by McCary) that once the tug switch occurred, the legs were to be placed at, and remain, 40 feet off bottom until the rig was quite near the wellsite. Once the rig was somewhere between 200 feet and 1500 feet of the site (again, the recollection of witnesses varies), the legs were to be dropped to a distance of 10 feet off bottom. There was no clear evidence presented (indeed, no one seemed to know) exactly when this 30 foot drop occurred. Oliver and Sun Oil engineer Kathy Jo Hayes stated that they understood from McCary's comments on August 6, 1978, that the legs had remained at the 40 foot height above bottom until the rig was quite near the wellsite, but then also stated that McCary, in a confused fashion, had also mentioned lowering the legs to 10 feet off bottom once the tug switch was accomplished. At any rate, the moving log kept by Captain Dillman shows that, as of 12:30 a.m. on August 5, 1978, the legs were 10 feet off the bottom. Captain Dillman himself testified that the legs were placed 10 feet off the bottom when the rig was one half mile from the wellsite, and that the legs were jacked down continuously once that process was begun.

18.

The gauges measuring pressure on the Marathon pipeline registered a sudden drop sometime between 12:30 a.m. and 12:55 a.m. on August 5, 1978. The ROWAN ODESSA was the only deep draft vessel in the vicinity

at this time, and there was no vessel anchored in the area.

19.

At the point of rupture, the pipeline lay in 242-245 feet of water, and was slightly more than one mile north of the wellsite. The side scan sonar studies of the pipeline conducted by Chance on August 6, 1978, as well as the observations of those divers who examined the damaged pipeline, indicate that "prints" which correlate to the position and shape of the rig legs of the ROWAN ODESSA were found on the pipeline at the point of damage. These tracks cross the pipeline in a generally northwesterly to southeasterly direction at a point between the Marathon and Sun Oil platforms slightly more than one mile north of the proposed well location.

20.

Based on strong circumstantial evidence, the Court finds from a preponderance of all the evidence that the legs of the ROWAN ODESSA struck the Marathon pipeline on August 5, 1978, causing the damage which forms the basis of this complaint.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of this action as an admiralty and maritime claim, and venue is proper in the Eastern District of Louisiana.

II.

Inasmuch as Marathon's pipeline was properly laid, in accordance with required permits, Marathon is not guilty of any fault or neglect which contributed to the damage sustained by the pipeline. *Gray v. Joansson*, 287 F.2d 852 (5th Cir. 1961), *cert. denied*, 368 U.S. 835, 82 S.Ct. 61, 7 L.Ed.2d 36 (1961).

III.

In a case of this nature, where there can be no eyewitnesses to the event causing damage, the facts cannot be found with absolute certainty or beyond a reasonable doubt. The rights of the parties are determined by a preponderance of the evidence, and reliance upon circumstantial evidence which supports the inference of causation and negligence is permissible. *Petition of Potomac Sand and Gravel Co.*, 253 F.Supp. 268 (D.Md. 1966); *So. Pacific v. Commercial Transport Corp.*, 1967 A.M.C. 565 (E.D.La. 1966).

IV.

By virtue of their agreement with Rowan, which agreement was drafted by Rowan's general counsel John Magner, Sun Oil agreed to provide Rowan with a "guidepath" and access to the drilling site. Rowan contends that Sun Oil breached this obligation as the term "guidepath" speaks for itself and is clear and unambiguous. However, at trial no one was able to clearly define the term. Magner testified that he had not placed in the contract a definition of the term and, when asked to define it, he stated he could not. The only witness at trial who attempted to define the term was Rowan's Executive Vice-President Charles W. Yeargain. His definition indicated that, between two points, there were no obstructions. Testimony at trial, however, indicated that the Gulf of Mexico has many subsurface pipelines, and it would be all but impossible to move a drilling rig within the Gulf

without encountering such obstructions. Hence, it is apparent that the term "guidepath" as used in Section 4(c) of the agreement between Rowan and Sun Oil was ambiguous and did not clearly indicate the intent of the parties regarding the obligation thereunder. It follows that such an ambiguous contractual provision must be construed against the party which drafted the agreement. (Rowan). *Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge MR. CHARLIE,* 294 F.Supp. 1025 (E.D.La. 1968), *aff'd in part, rev'd on other grounds,* 424 F.2d 684 (5th Cir. 1970).

Accordingly, the Court is unable to find that Sun Oil failed to fulfill its contractual duty to provide Rowan with a "guidepath" and access to the drilling site.

In addition to furnishing Rowan with a "guidepath", Sun Oil agreed to advise Rowan of any subsurface conditions or obstructions which Rowan might encounter during operations under the agreement, survey and mark locations, and provide towing service. In fulfillment of these obligations, Sun Oil provided Rowan with a map showing the as-built location of the pipeline and Sun Oil's foreman, Oliver, had yet another chart aboard the rig showing the location of the pipeline relative to the proposed drilling site. In addition, Sun Oil engaged the services of Chance to survey and mark the drilling location and, prior to the rig's arrival on location, had Chance mark the exact location of the pipeline. Finally, Sun Oil assumed the cost of the tugs which were engaged by Rowan to tow the ROWAN ODESSA to the drilling site.

Thus, having found that Rowan was well aware of the existence and location of the Marathon pipeline relative to the wellsite, prior to the arrival of the ROWAN ODESSA on location, the Court concludes that Sun Oil fulfilled all

of its obligations under its agreement with Rowan and that Sun Oil was not negligent in the planning as opposed to the operational aspects of the rig mov. *Contra, Transcontinental, supra.*

V.

In the instant case, a moving vessel, the ROWAN ODESSA, collided with a fixed subsurface object, the Marathon pipeline. When a moving vessel collides with an anchored vessel or a fixed object, there is a presumption the moving vessel is at fault, and the moving vessel bears the burden of rebutting this presumption by showing that it was without fault, or that the collision was caused by the fault of the stationary object, or that it was the result of inevitable accident. *The OREGON,* 158 U.S. 186, 197, 15 S.Ct. 804, 809, 39 L.Ed. 943 (1895); *The CLARITA,* 90 U.S. (23 Wall) 1, 13 23 L.Ed. 146 (1874); *Freeport Sulphur Co. v. S.S. HERMOSA,* 1974 A.M.C. 1315, 368 F.Supp. 952 (E.D.La.1973), *aff'd in pertinent part,* 1977 A.M.C. 508, 526 F.2d 300 (5th Cir. 1976); *Transcontinental, supra.* The presumption of fault on the part of the ROWAN ODESSA in hitting the pipeline has not been overcome. Rowan, the claimant-owner of the ROWAN ODESSA, has not shown that the collision was the result of inevitable accident nor has it shown that the collision was caused by the fault of the stationary object. The fact that the collision occurred required Rowan as owner of the vessel to show that the vessel, and those in charge of her navigation, were without fault. *Transcontinental, supra.*

Turning to the drilling vessel ROWAN ODESSA, the Court has found that the gauge on the vessel showing the depth to which the legs were extended was not in working order during the rig move. This required McCary, her master, to use numerical markings which appear on each leg,

and to apply a mathematical formula to determine the depth to which legs were lowered. Also, the rig was not equipped with a fathometer which would indicate the water depth below the vessel. Thus, the rig, in order to determine the water depth, had to contact the tugs which were equipped with fathometers. However, considering the fact that the rig was being towed, and the towing hawser was approximately 1800 feet in length, the rig would only be advised as to the water depth below the tugs more than one quarter mile away. Therefore, unless the rig was constantly being advised as to the water depth, any attempt by the rig mover to extend the rig legs to a specific depth above the floor of the Gulf at any point would be based on speculation as to the actual water depth below the rig at a given time.

In considering the actions of McCary, the master of the ROWAN ODESSA, the Court concludes that he failed to fully inquire into the location of the pipeline as the rig was nearing the drilling location, notwithstanding the fact that he had in his possession a map showing the as-built location of the pipeline and that the pipeline was marked by the Chance buoys. Testimony indicated that he relied solely upon the siting of the rig within an imaginary "triangle" created by nearby platforms, and did not take special precautions under the circumstances, such as locating the Chance marker buoys or requesting that the Chance survey vessel, the GULF EXPLORER, keep the rig advised as to the pipeline's location.

The Court finds that McCary was also negligent in failing to inquire into the depth of the water at the point where the ROWAN ODESSA crossed the pipeline, approximately one mile north of the proposed drilling location. Testimony indicated that McCary requested that the captain of the EL ZORRO GRANDE inform the rig when the flotilla was

approximately one hour from location so the rig could begin lowering its legs. At approximately 10:30 p.m. the rig was so informed and, thereafter, McCary requested the EL ZORRO GRANDE to determine from the Chance survey vessel the water depth at the wellsite. McCary, however, did not request depth readings at the location where the rig began the jack-down procedure or at any location other than the wellsite, apparently assuming the depth between rig and the wellsite was the same as that at the wellsite (255 feet).

Finally, McCary was negligent in timing the lowering of the rig's legs and in not allowing a reasonable margin of safety relative to the depth to which the legs were to be lowered.

The Court has found that the pipeline lay in 242-245 feet of water at the point of rupture, which rupture occurred approximately one mile north of the wellsite sometime between 12:30 a.m. and 1:00 a.m. on the morning of August 5. Assuming that McCary began to lower the legs at 90 feet per hour at 10:30 p.m., as he testified, and that the vessel had a draft of 26 feet, the legs would, after continuous lowering, have reached a depth, at 1:00 a.m., of 244 feet. The vessel's moving log, however, indicates that, at 12:30 a.m., the legs were 10 feet off bottom at 287 feet "rack". According to Captain Dillman, the legs were then at a depth of 257 feet. Thus, although the testimony was conflicting as to the depth to which the legs were extended, in any event, the margin for safety at the point where the rig crossed the pipeline was 0, instead of the usual 10 to 15 feet.

For the reasons cited hereinabove, any of which, in the Court's opinion, constituted fault on the part of the drilling vessel ROWAN ODESSA and/or her master, McCary, the Court finds that Rowan as claimant-owner has failed

to rebut the presumption that its vessel was at fault in causing the collision with the pipeline and that McCary, her master, was negligent. Accordingly, such fault on the part of the ROWAN ODESSA and those in charge of her navigation was the sole proximate cause of the damage to the Marathon pipeline.

VI.

Plaintiff has named as defendants Tidewater and Twenty Grand, as owner/operator of the three vessels engaged with towing the ROWAN ODESSA to the wellsite. Based on the evidence heard at trial and the applicable law, the Court is convinced that the towing vessels were in no way a contributing proximate cause of the collision with the Marathon pipeline. Virtually every witness testified that the tugs' behavior and navigation were commensurate with that level of care and expertise required of similarly situated towing vessels. It was also generally conceded that the tugs were directed by and subject to the orders of the rig manager, McCary. While the tugs were responsible for the safe conduct of the rig over water to the wellsite, they did not control or direct the movement of the rig's legs. At all times pertinent, the tugs were operating under the direction of McCary. As a result, they cannot be considered the "dominant mind" over their tow.

The "dominant mind" concept was developed to impose liability for a collision on the towing vessel for its faults in navigation, even though the tow may have contributed to the accident. The tug is generally considered the "dominant mind", since it provides the motive power. When, however, the collision is the result of a duty breached by the tow, and not the result of some fault or omission of the tug, the tow may be held solely liable for resulting damages.

Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975), p. 516; *Chevron U.S.A., Inc. v. Progress Marine, Inc.*, 1980 A.M.C. 1637, *aff'd*, 632 F.2d 893 (5th Cir. 1980). *See also Dow Chemical Co. v. Tug THOMAS ALLEN*, 394 F.Supp. 1354 (E.D.La. 1972), wherein it was stated:

> If the tow is the "dominant mind", the tug is not liable provided the tug has obeyed the tow's orders and has not herself been guilty of negligence, either in the manner of executing the orders or by participating in an obviously dangerous maneuver.

Dow Chemical, supra at 1363.

The tugs supplied depth readings to the ROWAN ODESSA throughout most of the move. Though the testimony was somewhat unclear as to whether the tugs possessed a pipeline chart on board, it appears that they did not. While sailing without a chart may render a vessel unseaworthy, the Court concludes that under the facts of this case, the failure of Tidewater and/or Twenty Grand to supply pipeline charts to the tugs was not the proximate cause of the casualty. *Dow Chemicals, supra.* Nor was the tug's relay to the rig of the Chance observation that the flotilla was east of the pipeline a proximate cause of the collision. The tugs were not requested nor under a duty to provide the rig with constant depth readings or to evaluate another party's knowledge of the flotilla's location relative to the pipeline. Rig personnel did not ask the tugs for depth readings or a navigational fix when they crossed the pipeline, as they had at other times during the move. The tugs were aware of the pipeline's presence, but, as numerous witnesses testified, the tugs were not responsible for, or in any way involved in the decision to lower the rig legs. At all times pertinent, the tugs exercised that degree of caution, care

and maritime skill which prudent navigators usually employ in similar undertakings. *United States Fire Insurance Co. v. Gulf States Marine & Mining Co.*, 262 F.2d 565 (5th Cir. 1959); *Chitty v. M/V VALLEY VOYAGER*, 284 F.Supp. 297 (E.D.La. 1968).

VII.

Plaintiff has also named as defendant Chance, the surveyor engaged by Sun Oil to buoy both the drilling location and the Marathon pipeline. Based on the testimony at trial, the Court concludes that Chance performed those services requested of it under its contract with Sun Oil in accordance with the "highest standards" in the industry. The services requested of it were: 1) to buoy the location of the well, and 2) to mark the Marathon pipeline west of location. The surveys undertaken subsequent to the pipeline rupture indicated that the three buoys placed over a 3000 foot area west of the location were placed over the pipeline. The buoy marking the wellsite location was also accurately placed.

It is clear from the testimony at trial that those aboard the rig did not expect the surveyor to "direct" the rig onto location, or to mark the pipeline at the point of crossing. In addition, there was much testimony indicating that the "missing map" aboard the rig was marked to show the three points at which the Chance buoys designated the pipeline. Caillier, the Chance surveyor, when requested by Rowan, provided the rig with the water depth at location. He was not, however, requested to determine the depth at the point where the rig crossed the pipeline.

Thus, Chance, as a service company, did what it was asked to do. It was not required or under a duty to warn an experienced contractor, such as Rowan, of dangers which

Rowan could be presumed to be familiar with, especially in light of Rowan's knowledge of the existence of the pipeline. *Waterbury v. Byron Jackson, Inc.*, 576 F.2d 1095 (5th Cir. 1978). Further, any negligence which the Chance crew may have committed was not a proximate cause of the damage to the pipeline. McCary's reliance upon a comment radioed by Caillier to the tug boats and which was relayed to McCary, to the effect that the rig was east of the pipeline, was misplaced. Notwithstanding this comment, however, it was the leg lowering process directed by McCary and prior to the Chance comment which ultimately caused the damage to the pipeline. Caillier asked rig personnel on at least two different occasions whether they were aware of the existence of the pipeline. The responses were affirmative and rig personnel requested no additional assistance.

VIII.

The court has reviewed the numerous allegations made by Rowan as to the fault of defendants and cross-defendants, Twenty Grand, Tidewater and Chance. However, such allegations have been found to be without merit.

Thus, having determined that Rowan was negligent and that such negligence was the proximate cause of the damage to the Marathon pipeline, the Court now focuses on Rowan's claims for indemnity.

IX.

In the contract between Sun Oil and Rowan, the indemnity provision appearing in Section 9(f)(2) (see Findings of Fact) provides that the Operator (Sun Oil) will indemnify Contractor (Rowan) against all claims arising "*in favor of Operator's employees, Operator's contracators or their*

employees,...on account of bodily injury, death or damage to property". (Emphasis supplied). Since the Court has determined that Rowan is the only party whose negligence caused the damage complained of, and since the claims of Tidewater, Twenty Grand and Chance for indemnity were premised upon the possibility that they might also be found negligent, the Court finds these provisions inoperable. Further, the indemnity provision clearly does not apply to any claim by Rowan for indemnity from Sun Oil based upon the negligence of Rowan. Finally, the contract and indemnity provisions are silent as to indemnity in the event of damage to the property of third parties, such as Marathon. Thus, the Court concludes that Rowan is not entitled to indemnity from Sun Oil pursuant to their contractual obligations.

X.

Rowan argues that it may claim indemnity from Chance under the terms of the following indemnity provision contained in the contract between Sun Oil and Chance:

> INDEMNITY: Contractor [Chance] agrees to protect, defend, indemnify and hold Sun [Sun Oil] and *those* who are joint adventurers, partners, co-owners of the property, or *otherwise associated with Sun in receiving the benefits of the work or services to be rendered or performed hereunder,* and the employees of Sun and of such associates of Sun, free and harmless from and against any and all claims, demands and causes of action of every kind and character from any cause whatsoever by any party hereto, any party acquiring any interest hereunder, any of their agents and employees, and any third or other party whomsoever, or governmental agency, arising out of, incident to, or in connection with this agreement or performance of work or services thereunder or breach of the terms,

> thereof, including without limitation by enumeration all taxes, claims, debts, fines, penalties, forfeitures, patent infringements, loss of use, death, injury and damages to all persons and property, together with the amount of judgments, penalties, interest, court costs, legal and other fees and expenses in connection therewith, regardless of whether the liability therefor is based upon some alleged act or omission of Sun or of Contractor or of some other party.

(Emphasis supplied).

Specifically, Rowan argues that it may claim indemnity from Chance as one who received "benefits of the work or services to be rendered or performed hereunder". The Court rejects this contention. The obligation to indemnify is to be strictly construed, and the status of indemnitee is also interpreted narrowly. *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel Margaret*, 441 F.Supp. 1 (E.D.La. 1975), *aff'd*, 565 F.2d 958 (5th Cir. 1978). Additionally, an indemnity agreement will be held to benefit a particular party only when it is express in that effect, and reflects the clear intent of the parties. *Day v. Odeco*, 353 F.Supp. 1350 (E.D.La. 1973). The Court is not convinced that the above-quoted language expresses the clear intent of the parties [Sun Oil and Chance] to indemnify a contractor such as Rowan for its [Rowan's] own negligence. Rather, the provision when taken as a whole indicates that the phrase "those...otherwise associated with Sun in receiving the benefit..." would include those persons associated or affiliated with Sun Oil enjoying the benefit of the work being performed rather than the contractors such as Rowan who are actually performing the work contracted for. Thus, the Court concludes that Rowan is not entitled to indemnity from Chance pursuant to the contract between Sun Oil and Chance.

Accordingly, IT IS ORDERED that judgment be entered in accordance with this opinion in favor of plaintiff, Marathon Pipe Line Company, and in favor of defendants, Sun Oil Company, Sun Gas Company, John E. Chance and Associates, EL ZORRO GRANDE, EL JAGUAR GRANDE, LEOPARDO GRANDE, *in rem*, Twenty Grand Offshore, Inc., and Tidewater Marine Service, Inc., *in personam*, and against defendant ROWAN ODESSA, *in rem*, and Rowan Companies, Inc., *in personam*. All cross-claims are hereby dismissed, with the amount of damages to be established by Marathon at a subsequent trial of that issue, if parties are unable to stipulate to same.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
November 24, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARATHON PIPE LINE COMPANY	CIVIL ACTION
VERSUS	NO. 79-403
DRILLING RIG ROWAN/ODESSA, et al	SECTION "K"

JUDGMENT

This cause came on for trial before the court on a former day, and after hearing testimony of witnesses and considering the evidence adduced, the Court took the matter under submission.

Now, therefore, considering the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Tug El Zorro Grande, *in rem*, Tug El Jaguar Grande, *in rem*, M/V Leopardo Grande, *in rem*, Sun Oil Company, Sun Gas Company, Inc., John E. Chance & Associates, Inc., Twenty Grand Offshore, Inc., and Tidewater Marine Services, Inc., and against plaintiff, Marathon Pipe Line Company, dismissing said plaintiff's complaint with prejudice, each party to bear its own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all cross claims are hereby Dismissed.

New Orleans, Louisiana, this 1st day of December, 1981.

UNITED STATES DISTRICT JUDGE

APPENDIX "B"

MARATHON PIPE LINE COMPANY,
Plaintiff-Appellee Cross-Appellant,

v.

DRILLING RIG ROWAN/ODESSA,
Rowan Companies, Inc.,
Defendants-Appellants,

v.

Tug El Zorro Grande, et al.,
Defendants-Appellees,

Sun Oil Company, et al.,
Defendants-Appellees, Cross-Appellants.

No. 81-3779

United States Court of Appeals
Fifth Circuit.

Feb. 28, 1983.

Pipe line owner brought suit in admiralty seeking compensation for damage sustained when pipeline was struck by drilling rig as rig was being moved to location of underwater oil well. The District Court, George Arceneaux, Jr., 527 F.Supp. 824, entered judgment in favor of pipe line owner, and an appeal was taken. The Court of Appeals held that sequestration of witness whom drilling rig owner sought to have present in courtroom as its "representative" was not established as successful ground for appeal.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

We AFFIRM on the basis of the opinion of the district court, 527 F.Supp. 824, with the additional finding which follows.

The district court did not discuss in its opinion an issue which has been raised by the Rowan Companies in its appeal. At the outset of the trial the district court ordered the sequestration of the witnesses, including Mr. Robert G. McCary, who was the person placed in charge of the moving of the drilling rig Rowan/Odessa. Mr. McCary was allowed to remain in the courtroom only after his testimony. Rowan now claims that Mr. McCary was its "designated representative" and, therefore, could not be excluded from the courtroom under Rule 615, Fed.R.Evid.

For any one of three reasons we find that the district court must be affirmed on its sequestration ruling. First, while the record makes it clear that the Rowan Companies stated Mr. McCary was their "representative" before the court placed him under the general order of sequestration, no objection nor claim of violation of the Constitution or laws or of Rule 615, Fed.R.Evid., was lodged by the Rowan Companies. There was not the slightest indication given that Rowan in any way disapproved of the ruling of the trial judge at that time or at any other time while this case was pending in the district court. This, undoubtedly, is why the district court did not refer to this matter in its opinion.

While it is true that Rule 46 of the Fed.R.Civ.P. does not require formal exceptions to rulings or orders of the court, that rule requires that the party must make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." After the objection to McCary's presence was made by another party, Rowan did not make known to the court any action which it desired the court to take. Nor did it object to the action of the court. Reading the record, there is no way that the court could have concluded that Rowan wished to make an issue of its action or disagreed with it in the slightest degree.

Second, on the face of the record McCary was not an employee of the Rowan Companies, Inc., the party to the proceedings. McCary testified on the stand that he was an employee, apparently, of a separate corporation, Rowan International. Rule 615, Fed.R.Evid., requires that to be excepted from sequestration the representative must be "an officer or employee of a party which is not a natural person...." Nothing in the record shows what the relationship was between the Rcwan Companies and Rowan International, nor does it show that McCary actually was an employee of the Rowan Companies, Inc. The record does not establish that the Rowan Companies were entitled to claim McCary as their representative under Rule 615.

Third, even assuming that the district court committed error in sequestering Mr. McCary, there was not the slightest reference to the effect of this sequestration throughout the entire record. The Rowan Companies make no showing that the ruling was prejudicial, and prejudice must be shown to justify reversal. As this Court held in *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), the failure to sequester government wit-

nesses, while clearly error, does not require reversal even in a criminal case without proof of prejudice.

We find that defendant Rowan Companies, Inc. have not established as a successful ground for appeal the sequestration of Mr. McCary from the courtroom until he was called as a witness.

AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3779

MARATHON PIPE LINE COMPANY,

Plaintiff-Appellee
Cross-Appellant,

versus

DRILLING RIG ROWAN/ODESSA,
ROWAN COMPANIES, INC.,

Defendants-Appellants,

versus

TUG EL ZORRO GRANDE, ET AL.,

Defendants-Appellees,

SUN OIL COMPANY, ET AL.,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(March 31, 1983)

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "D"

PROCEEDINGS

THE COURT: Are counsel ready?

MR. READ: Plaintiff is ready?

THE COURT: Would you please enter an appearance for the record, Mr. Read.

MR. READ: For the plaintiff, Marathon, Henry Read and Gordon Grant of Montgomery, Barnett, Brown & Read.

MR. BLAZEK: For the Rowan Companies, Jim Blazek, Mr. Ernest Carrere, Alan Zaunbrecher, Jim Wright.

MR. BIENVENU: For Sun Oil Company of Delaware, Albert Bienvenu, Jr. and John McAuliffe.

MR. HEALY: May it please the Court, for Tidewater and Twenty Grand, George Healy and Richard Dicharry.

MR. STEEN: For John Chance & Associates, Charles Steen and Larry Roedel.

THE COURT: Okay, gentlemen. Do you wish the witnesses sequestered?

MR. READ: Yes, your Honor.

MR. STEEN: We would ask that they be sequestered, and I notice that Rowan Company has Mr.

McCary sitting here, apparently as a representative. He's not an officer or representative of the company, and I would suggest that he ought to be sequestered, too.

MR. BLAZEK: We intend to have Mr. McCary here as the client representative in order to assist us in the trial of this case.

THE COURT: Will he testify?

MR. BLAZEK: Yes, sir, he will.

MR. STEEN: He is a key witness, your Honor.

MR. BIENVENU: I join in the objection.

THE COURT: What is his position with the corporation?

MR. BLAZEK: He is the rig manager. That's his official title.

THE COURT: This particular rig, the rig in question?

MR. BLAZEK: Yes, your Honor.

THE COURT: I'm going to order him sequestered until he testifies. All persons who are going to testify in this cause please repair to the hallway and remain there until you are called, and do not discuss this case amongst yourselves while you're waiting to testify.

MR. HEALY: Could we have Mr. Bill West, who has been subpoenaed by, I think, Rowan, and who is in the

courtroom. I think he's going to identify some documents. If anybody has any objection, we'll send him out, too.

MR. BLAZEK: If he's just going to identify documents and not testify to any factual matters—

MR. HEALY: To be safe, you better go out to the hall.

MR. BIENVENU: Mr. Donald Robillard, who is an attorney with the Sun Companies, expects to be here during the trial. However, I might call him concerning the contract, the fact that Rowan drew up the contract. I don't believe he will testify much beyond that. Do you have any objection to that?

MR. BLAZEK: Yes, your Honor.

THE COURT: Fair is fair. Okay, he will be excluded, also.

MR. READ: Your Honor, the plaintiffs have Mr. Harold Miller, division manager of Marathon Pipeline, and he would be our first witness. I don't think he will present any problem. We're going to call him first.

THE COURT: Anyone else?

MR. STEEN: I have one small matter before we commence.

THE COURT: Okay, sir.

MR. STEEN: Your Honor, at the evidentiary hearing or conversation which we had the other day, counsel

for the plaintiffs submitted a pre-trial memorandum, and attached to the pre-trial memorandum was some extracts of some depositions, and as I understood, the purpose of that was essentially to see if we could arrive at some stipulations. Your Honor, as you know, we did not, and I would suggest to the Court that most, if not all, of the witnesses for whom extracts have been

APPENDIX "E"

PROCEEDINGS

THE COURT: Be seated, please. All right, Mr. Blazek.

MR. BLAZEK: I'd like to call Robert McCary, your Honor.

THE COURT: All right.

ROBERT McCARY,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name for the record, please.

A Robert George McCary.

Q And Mr. McCary, where do you live?

A Metairie, Post Office Box 7493, Metairie.

Q By whom are you employed?

A Rowan. Rowan International.

Q Okay. And what is your job?

A Rig manager.

Q What does a rig manager do?

A He's in charge of all operations of the rig.

Q Okay. Can you tell us just briefly, very shortly, what that entails.

A Well, mechanical, down-hole problems, moving of the rig, and getting it ready to move.

Q Do you limit your activities of just being on the

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NO. 82-1919

Office - Supreme Court, U.S.
FILED
JUN 25 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARATHON PIPE LINE COMPANY,
Respondent

versus

ROWAN COMPANIES, INC. and
DRILLING RIG ROWAN/ODESSA,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF MARATHON PIPE LINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Henry J. Read
1800 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
TELEPHONE: (504) 561-8989

Counsel for Respondent
Marathon Pipe Line Company

OF COUNSEL
A. Gordon Grant, Jr.
MONTGOMERY, BARNETT,
BROWN & READ

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the District Court violated Rule 615 of the Federal Rules of Evidence and the "Due Process" clause of the Fifth Amendment to the United States Constitution by temporarily excluding from the trial a fact witness not shown by the record to be an officer or employee of corporate defendant Rowan.

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SUMMARY OF ARGUMENT

The temporary exclusion of the witness Robert McCary from the courtroom was a proper exercise of the trial court's discretion. The record does not show that McCary was an officer or employee of the corporate defendant cast in judgment and hence he does not qualify as a "designated representative" under Rule 615 of the Federal Rules of Evidence. Moreover, petitioner Rowan failed to comply with Rule 46 of the Federal Rules of Civil Procedure. Furthermore, as indicated in the opinion of the Fifth Circuit Court of Appeals, even if the exclusion of the witness had been inappropriate, only harmless error resulted and the petitioner was not prejudiced by the ruling.

ARGUMENT

MAY IT PLEASE THE COURT:

I.

FEDERAL RULE OF EVIDENCE 615(2) IS INAPPLICABLE TO THE FACTS OF THIS CASE

Rowan's argument concerning Rule 615(2) is predicated upon a fact not shown by the record, namely, that McCary was an employee of a party to this litigation. As stated by the Fifth Circuit:

> "[O]n the face of the record McCary was not an employee of the Rowan Companies, Inc., the party to the proceedings. McCary testified on the stand that he was an employee, apparently, of a separate corporation, Rowan International. Rule 615, Fed.R.Evid., requires that to be excepted from sequestration the representative must be "an officer or employee of a party which is not a natural person...." Nothing in the record shows what the relationship was between the Rowan Companies and Rowan International nor does it show that McCary actually was an employee of the Rowan Companies, Inc. The record does not establish that the Rowan Companies were entitled to claim McCary as their representative under Rule 615."

Since the petitioner failed to prove that McCary was an employee of Rowan Companies, Inc., there is no basis for Rowan's argument. The exclusion of McCary was a proper exercise of the trial court's discretion.

II.

ROWAN FAILED TO COMPLY WITH FRCP 46 AND THUS FAILED TO PRESERVE THIS ISSUE FOR APPELLATE REVIEW

As was stated in this case by the Fifth Circuit:

> "While it is true that Rule 46 of the Fed.R.Civ.P. does not require formal exceptions to rulings or orders of the court, that rule requires that the party must make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." After the objection to McCary's presence was made by another party, Rowan did not make known to the court any action which it desired the court to take. Nor did it object to the action of the court. Reading the record, there is no way the court could have concluded that Rowan wished to make an issue of its action or disagreed with it in the slightest degree."

> "[N]o objection nor claim of violation of the Constitution or laws or of Rule 615, Fed.R.Evid., was lodged by the Rowan Companies. There was not the slightest indication given that Rowan in any way disapproved of the ruling of the trial judge at that time or at any other time while this case was pending in the district court. This, undoubtedly, is why the district court did not refer to this matter in its opinion."

Rowan is not entitled to raise this argument as an afterthought and seek relief at the appellate level.

III.

PETITIONER WAS NOT PREJUDICED BY THE LOWER COURT RULING

Even if the record supported Rowan's argument regarding Rule 615, the result would be harmless error absent a demonstrated prejudice to Rowan resulting from McCary's temporary absence from the courtroom until after he testified. There is no authority cited by Rowan which mandates a reversal. As was stated by the Fifth Circuit:

> "The Rowan Companies make no showing that the ruling was prejudicial, and prejudice must be shown to justify reversal. As this Court held in *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), the failure to sequester government witnesses, while clearly error, does not require reversal even in a criminal case without proof of prejudice."

Rowan failed to meet the burden of proving prejudice. This is especially true in light of the fact that this is a civil case. There is no criminal confrontation issue here. Rowan raises no question relating to a constitutional right. McCary's exclusion was temporary and minimal and Rowan has not shown any prejudice resulting therefrom.

CONCLUSION

There is not the slightest suggestion in the issue raised by Rowan that Marathon is not entitled to be reimbursed for the amount of its damages. Nor is there the slightest question raised concerning the *in rem* responsibility of the Rowan drilling rig against which judgment entered in the

trial court. Granting of the writ would do no more than require a retrial of the same issues with the same inevitable result. For the foregoing reasons, Rowan's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HENRY J. READ
1800 First National Bank of Commerce Building
New Orleans, LA 70112
TELEPHONE: (504) 561-8989

Counsel for
Marathon Pipe Line Company

OF COUNSEL

A. Gordon Grant, Jr.
MONTGOMERY, BARNETT,
BROWN & READ

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing have been served on the parties required to be served under Rule 28 of the Rules of the United States Supreme Court, as follows:

1. James E. Blazek and Alan A. Zaunbrecher of Adams & Reese, 4500 One Shell Square, New Orleans, LA 70139, and Ernest A. Carrere, Jr. and James E. Wright, III of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, LA 70112, attorneys for Rowan Companies, Inc. and the Drilling Rig ROWAN/ODESSA.

2. P. Albert Bienvenu, Esq., attorney for Sun Oil Company and Sun Gas Company, at Foster, Ryan & O'Bannon, 200 Carondelet Street, New Orleans, LA 70130.

3. Charles W. Steen, Esq., attorney for John E. Chance & Associates, Inc., at Liskow & Lewis, 50th Floor One Shell Square, New Orleans, LA 70139.

4. George W. Healy, III, Esq., attorney for Twenty Grand Offshore, Inc., Tidewater Marine Services, Inc., the tug EL ZORRO GRANDE, the tug EL JAGUAR GRANDE, and the tug LEO PARDO GRANDE, at Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, LA 70112.

HENRY J. READ

Office - Supreme Court, U.S.
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CLERK

NO. 82-1919

In the Supreme Court of the United States

OCTOBER TERM, 1982

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Respondent,

VERSUS

ROWAN COMPANIES, INC. and
DRILLING RIG ROWAN/ODESSA,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SUN OIL COMPANY (DELAWARE)

P. ALBERT BIENVENU, JR.
JOHN E. McAULIFFE, JR.
BIENVENU, FOSTER,
RYAN & O'BANNON
1400 American Bank Building
New Orleans, LA 70130
(504) 581-2146
Attorneys for Sun Oil Company
(Delaware)

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

**LIST OF PARENTS,
SUBSIDIARIES AND AFFILIATES
OF RESPONDENT, SUN OIL COMPANY
(DELAWARE)**

CANYON REEF CARRIERS, INC.
EAST TEXAS SALT WATER DISPOSAL COMPANY
VAN SALT WATER DISPOSAL COMPANY
SUNCOR INC.
ALBERSUN PIPELINE LTD.
ALBERTA GAS TRUNK LINE COMPANY LTD.
ATHABASCA REALTY COMPANY LIMITED
BARON PETROLEUMS INC.
CARNDUFF GAS LIMITED
GOW FUELS INC.
MAYWELLE PROPERTIES LTD.
NOTTINGHAM GAS LIMITED
OUIMET-GOBEILLE INC.
PEMBALTA GAS SYSTEM NO. 3 LTD.
PEMBALTA GAS SYSTEM NO. 4 LTD.
REDWATER WATER DISPOSAL COMPANY LIMITED
SMS PETROLEUMS LTD.
SULTRAN LTD.
SUN-CANADIAN PIPE LINE COMPANY LIMITED
SUN EXPLORATIONS OF QUEBEC LTD.
SUN OIL COMPANY OF CANADA LIMITED
SUNCOR SUPPLY LIMITED
SUNOCO INC.
CHEMSUN INC.
SOLARTECH LIMITED
SUNCHEM INC.
SUNCHEM SHIPPING INC.
SUNCHEM (U.K.) LIMITED
TRILLIUM EXPLORATION CORPORATION
RAUB SUPPLY COMPANY
CARBOLINE-FERRO POWDER COATINGS COMPANY

VESSEY CHEMICALS PTY. LTD.
CARBOLINE COATINGS LTD.
CARBOLINE SOUTH EAST ASIA LTD.
STAR CARBOLINE
TARANAKI BLAST SERVICES LTD.
JAPAN CARBOLINE COMPANY
CARBOLINE EUROPE
CARBOLINE S. A. de C.V.
TRETOL LTD.
SUNOLIN CHEMICAL COMPANY
HEMISPHERE OIL COMPANY, INC.
JAPAN SUN OIL COMPANY, LTD.
LUGRASA, S. A.
SUNOCO DE CHILE, LTDA
ALASKA BULK CARRIERS, INC.
GLACIER BAY TRANSPORTATION COMPANY
EXPLORER PIPELINE COMPANY
INLAND CORPORATION
MID-VALLEY PIPELINE COMPANY
TEXOMA PIPE LINE COMPANY
WEST TEXAS GULF PIPE LINE COMPANY
LONG BRANCH EQUIPMENT COMPANY
PERRY COUNTY COAL CORPORATION
WHITE RIVER SHALE OIL CORPORATION
DEEPSEA VENTURES, INC.
OIL INSURANCE LIMITED
TOTEM RESOURCES CORPORATION
INTERNATIONAL BIOMEDICAL INSTRUMENTS, INC.
THE VLM CORPORATION

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Federal Rules of Civil Procedure, Rule 46:

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires

the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

2. Federal Rules of Evidence, Rule 615

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

SUMMARY OF ARGUMENT

The sequestration of petitioner's witness, Robert McCary, did not violate petitioner's constitutional rights, or F.R.E. Rule 615.

Petitioner's claimed "designated representative" was not qualified as such under Rule 615 as he was never shown to be an officer or employee of petitioner, Rowan Companies, Inc., in fact, he was not an officer or employee as he admitted in his testimony. Additionally, petitioner made no objection to the sequestration of McCary nor did it seek to designate any other representative, such as its Executive Vice President or General Counsel who were available and did testify during the trial. Petitioner has failed to demonstrate any resulting prejudice from the

court's sequestration order.

ARGUMENT

MAY IT PLEASE THE COURT:

Rowan Companies, Inc. has petitioned this court for review claiming error on the part of the District Court in including Robert McCary in its sequestration order. The petitioner claims that it was entitled to designate this witness as its "company representative" and therefore exclude him from sequestration under Rule 615, Federal Rules of Evidence.

The District Court was correct in sequestering McCary from trial for any one of four reasons.

First, although placed at issue at the outset of trial by counsel for John E. Chance & Associates, Inc., Mr. Steen, Rowan failed to make a showing that McCary was an officer or employee of petitioner, Rowan Companies, Inc. (See: Appendix A, Tr. pp. 4-5)

As discussed by the U.S. Court of Appeals, Fifth Circuit, the only showing was that McCary was employed by Rowan International, Inc. (See: Appendix B, Tr. p. 539) No explanation was given as to what relationship existed, if any, between petitioner, Rowan Companies, Inc. and Rowan International, Inc. It is clear that they are separate corporations. (See: Appendix C, Opinion and Judgment of U.S. Court of Appeal for the Fifth Circuit) This falls far short of the required showing that the witness was "... an officer or employee of a party ..." as spelled out in Rule 615, Federal Rules of Evidence.

McCary's employer, Rowan International, Inc. is listed as the twenty-second entry on the Rowan Companies, Inc. list of parents, subsidiaries and affiliates (Appendix E, p. A-36, Vol. II, Petition for Writ of Certiorari, incorporated herein by reference) and is further evidence of the correctness of the sequestration ruling in the trial court.

In *Varlack vs. SWC Caribbean, Inc.*, 550 F.2d 171 (3rd.Cir.1977), the court refused to allow a former owner of a corporate defendant to remain in the courtroom. There is even less connexity between McCary and Rowan Companies, Inc. than there was in *Varlack, supra.* As stated above, the record actually indicates that McCary was not an officer or employee of a party.

The *Varlack* decision also provides a second ground for affirming the District Court. In refusing to find error in the trial court's ruling, the Third Circuit stated as follows:

> Since SWC Caribbean did not describe Creque's present status with sufficient clarity, its due process claim is also groundless. At p. 175.

Counsel for Rowan gave no explanation as to McCary's status, other than to state that he was the "rig manager". As it developed in the testimony of this witness, his status was not that which would entitle him to be excluded from sequestration.

Third, counsel for Rowan did not object or claim that its constitutional rights were being violated at the time that McCary was subjected to the sequestration rule. The transcript (See: Appendix A, Tr. pp. 4-5) clearly shows that Rowan's counsel made no objection and made no attempt

to inform the court of the action he desired. He made no attempt to factually demonstrate that McCary fell within an exception to the sequestration rule. He made no request for protective measures. He did not attempt to designate any other "officer or employee" of Rowan Companies, Inc. as its company representative such as its General Counsel or Executive Vice President, each of which testified during the trial. (See: Appendix D, Tr. pp. 462-463 and 468-470 and Appendix E, Tr. pp. 489-491)

Although F.R.C.P. Rule 46 does not require a formal exception to a court order, the provisions do require that a party's objection be made known to the court in some manner. *Brookhaven Landscape & Grading Co., Inc. vs. J. F. Barton Contracting Co.*, 676 F.2d 516 (11th.Cir.1982); *Neu vs. Grant*, 548 F.2d 281 (10th.Cir.1977).

The requirement of making an objection known to the court and other parties serves two purposes as set out in *Neu, supra*, as follows:

> It provides the trial court with the opportunity to know the specific contentions and to take corrective action, if required. And—more importantly for appellant review—it does not permit a party to sit idly by, watching error being committed, and then take a "first" shot at the claimed error without having accorded the trial court the opportunity to correct its action. Such is not allowed. Johnson v. United States, 318 U.S. 189, 63 S.Ct. 549, 59 L.Ed. 704 (1943); Chavez v. New Mexico, 456 F.2d 1072 (10th.Cir.1972). At p. 287.

In this instance, Rowan gave no opportunity for corrective action by the court. This issue was first addressed on appeal and no objection was made below.

Due to Rowan's failure to comply with Rule 46, this issue is not reviewable by this Honorable Court.

Finally, Rowan has failed to show any prejudice resulted from the court's ruling. In order for error to be grounds for reversal, the petitioner must demonstrate how it was prejudiced by the court's action. *United States v. Warren*, 578 F.2d 1058 (5th.Cir.1978); *Wood vs. Southwestern Bell Telephone Co.*, 637 F.2d 1188 (8th.Cir.1981), *cert. den.* 102 S.Ct. 142, 454 U.S. 837, 70 L.Ed.2d 118.

Rowan has failed to demonstrate just how it was prejudiced by McCary's absence. In this regard it is important that petitioner's Executive Vice President, Yeargain, as well as its General Counsel, Magner, were present in the courthouse and available for attendance at all phases of the trial. They each testified as witnesses in the case. (See: Appendix D, Tr. p. 462 and Appendix E, Tr. pp. 489-490) Yeargain was familiar with oilfield work having risen from a roustabout to Executive Vice President (See: Appendix D, Tr. pp. 462-463 and 468-470), and he claimed knowledge of the type of operations which were at issue in this case. Magner, General Counsel, was also familiar with oilfield operations and even more importantly was the author of the contract which was at issue and which spelled out the duties and relationships among the parties. (See: Appendix E, Tr. pp. 489-491) Both Magner and Yeargain were involved in the actual planning and execution of the movement of the rig which was the subject of the litigation. (See: Appendix D, Tr. pp. 462-463 and 468-470 and Appendix E, Tr. pp. 489-491) Either could have qualified as company representative under Federal Rules of Evidence, Rule 615; neither was offered in place of McCary.

CONCLUSION

No error was committed by the trial court in subjecting McCary to the sequestration order. The fact that the witness was not an officer or employee of Rowan Companies, Inc. disqualifies him as a person entitled to exclusion from sequestration. Alternatively, and for the purpose of argument, even assuming that the trial judge was in error in sequestering McCary, Rowan has failed to show the required prejudice. The petition for writ of certiorari should be denied.

BIENVENU, FOSTER, RYAN
& O'BANNON

BY: _____
P. ALBERT BIENVENU, JR.
JOHN E. McAULIFFE, JR.
1400 American Bank Building
New Orleans, LA 70130
(504) 581-2146

PROOF OF SERVICE
CERTIFICATE OF BAR MEMBER

I, P. Albert Bienvenu, Jr., one of the attorneys for Sun Oil Company (Delaware), respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 23rd day of June, 1983, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on all parties required to be served under Rule 28 of the Rules of the United States Supreme Court, as follows:

1. Henry J. Read, Esq., attorney for Marathon Pipeline Company, at Montgomery, Barnett, Brown & Read, 1800 First NBC Building, New Orleans, Louisiana, 70112.

2. James E. Blazek, Esq., attorney for Rowan Companies, Inc. and the Drilling Rig ROWAN/ ODESSA, at Adams & Reese, 4500 One Shell Square, New Orleans, Louisiana, 70139.

3. Charles W. Steen, Esq., attorney for John E. Chance & Associates, Inc., at Liskow & Lewis, 50th Floor, One Shell Square, New Orleans, Louisiana, 70139.

4. George W. Healy, III, Esq., attorney for Twenty Grand Offshore, Inc., Tidewater Marine Services, Inc., the tug EL ZORRO GRANDE, the tug EL JAGUAR GRANDE and the tug LEO PARDO GRANDE, at Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, Louisiana, 70130.

P. ALBERT BIENVENU, JR.

Attorney for Sun Oil Company
(Delaware)
BIENVENU, FOSTER, RYAN
& O'BANNON
1400 American Bank Building
New Orleans, LA 70130
(504) 581-2146

APPENDIX "A"

THE COURT: Are counsel ready?

MR. READ: Plaintiff is ready?

THE COURT: Would you please enter an appearance for the record, Mr. Read.

MR. READ: For the plaintiff, Marathon, Henry Read and Gordon Grant of Montgomery, Barnett, Brown & Read.

MR. BLAZEK: For the Rowan Companies, Jim Blazek, Mr. Ernest Carrere, Alan Zaunbrecher, Jim Wright.

MR. BIENVENU: For Sun Oil Company of Delaware, Albert Bienvenu, Jr. and John McAuliffe.

MR. HEALY: May it please the Court, for Tidewater and Twenty Grand, George Healy and Richard Dicharry.

MR. STEEN: For John Chance & Associates, Charles Steen and Larry Roedel.

THE COURT: Okay, gentlemen. Do you wish the witnesses sequestered?

MR. READ: Yes, your Honor.

MR. STEEN: We would ask that they be sequestered, and I notice that Rowan Company has Mr. McCary sitting here, apparently as a representative. He's not an officer or representative of the company, and I

would suggest that he ought to be sequestered, too.

MR. BLAZEK: We intend to have Mr. McCary here as the client representative in order to assist us in the trial of this case.

THE COURT: Will he testify?

MR. BLAZEK: Yes, sir, he will.

MR. STEEN: He is a key witness, your Honor.

MR. BIENVENU: I join in the objection.

THE COURT: What is his position with the corporation?

MR. BLAZEK: He is the rig manager. That's his official title.

APPENDIX "B"

ROBERT McCARY,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name for the record, please.

A Robert George McCary.

Q And Mr. McCary, where do you live?

A Metairie, Post Office Box 7493, Metairie.

Q By whom are you employed?

A Rowan. Rowan International.

Q Okay. And what is your job?

A Rig manager.

Q What does a rig manager do?

A He's in charge of all operations of the rig.

Q Okay. Can you tell us just briefly, very shortly, what that entails.

A Well, mechanical, down-hole problems, moving of the rig, and getting it ready to move.

APPENDIX "C"

MARATHON PIPE LINE COMPANY,
Plaintiff-Appellee Cross-Appellant,

v.

DRILLING RIG ROWAN/ODESSA,
Rowan Companies, Inc.,
Defendants-Appellants,

v.

Tug El Zorro Grande, et al.,
Defendants-Appellees,

Sun Oil Company, et al.,
Defendants-Appellees, Cross-Appellants.

No. 81-3779

United States Court of Appeals
Fifth Circuit.

Feb. 28, 1983.

Pipe line owner brought suit in admiralty seeking compensation for damage sustained when pipeline was struck by drilling rig as rig was being moved to location of underwater oil well. The District Court, George Arceneaux, Jr., 527 F.Supp. 824, entered judgment in favor of pipe line owner, and an appeal was taken. The Court of Appeals held that sequestration of witness whom drilling rig owner sought to have present in courtroom as its "representative" was not established as successful ground for appeal.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

We AFFIRM on the basis of the opinion of the district court, 527 F.Supp. 824, with the additional finding which follows.

The district court did not discuss in its opinion an issue which has been raised by the Rowan Companies in its appeal. At the outset of the trial the district court ordered the sequestration of the witnesses, including Mr. Robert G. McCary, who was the person placed in charge of the moving of the drilling rig Rowan/Odessa. Mr. McCary was allowed to remain in the courtroom only after his testimony. Rowan now claims that Mr. McCary was its "designated representative" and, therefore, could not be excluded from the courtroom under Rule 615, Fed.R.Evid.

For any one of three reasons we find that the district court must be affirmed on its sequestration ruling. First, while the record makes it clear that the Rowan Companies stated Mr. McCary was their "representative" before the court placed him under the general order of sequestration, no objection nor claim of violation of the Constitution or laws or of Rule 615, Fed.R.Evid., was lodged by the Rowan Companies. There was not the slightest indication given that Rowan in any way disapproved of the ruling of the trial judge at that time or at any other time while this case was pending in the district court. This, undoubtedly, is why the district court did not refer to this matter in its opinion.

While it is true that Rule 46 of the Fed.R.Civ.P. does not require formal exceptions to rulings or orders of the court, that rule requires that the party must make known "to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." After the objection to McCary's presence was made by another party, Rowan did not make known to the court any action which it desired the court to take. Nor did it object to the action of the court. Reading the record, there is no way that the court could have concluded that Rowan wished to make an issue of its action or disagreed with it in the slightest degree.

Second, on the face of the record McCary was not an employee of the Rowan Companies, Inc., the party to the proceedings. McCary testified on the stand that he was an employee, apparently, of a separate corporation, Rowan International. Rule 615, Fed.R.Evid., requires that to be excepted from sequestration the representative must be "an officer or employee of a party which is not a natural person...." Nothing in the record shows what the relationship was between the Rowan Companies and Rowan International nor does it show that McCary actually was an employee of the Rowan Companies, Inc. The record does not establish that the Rowan Companies were entitled to claim McCary as their representative under Rule 615.

Third, even assuming that the district court committed error in sequestering Mr. McCary, there was not the slightest reference to the effect of this sequestration throughout the entire record. The Rowan Companies make no showing that the ruling was prejudicial, and prejudice must be shown to justify reversal. As this Court held in *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (en banc), the failure to sequester government wit-

nesses, while clearly error, does not require reversal even in a criminal case without proof of prejudice.

We find that defendant Rowan Companies, Inc. have not established as a successful ground for appeal the sequestration of Mr. McCary from the courtroom until he was called as a witness.

AFFIRMED.

APPENDIX "D"

CHARLES W. YEARGAIN,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name for the record, please.

A My name is Charles W. Yeargain.

Q And, Mr. Yeargain, where do you live?

A I live in Houston.

Q Okay. And by whom are you employed?

A Rowan Company, Incorporated.

Q And what is your title?

A Executive vice-president.

Q And what do your duties consist of as executive vice-president?

A Looking after the drilling operations, primarily.

Q And how many drill rigs does Rowan have?

A Many.

Q What type of drilling rigs?

A Land, jack-up, semi-submersible, tenders, and self-contained platforms.

Q How long have you been employed by Rowan?

A Thirty-three years.

Q And would you tell the Court, just briefly and shortly as you can, the types of positions you've had at Rowan.

A I started out thirty-three years ago as a roughneck. I went from a roughneck to a derrick man, engine man, driller, tool pusher, drilling superintendent, division drilling superintendent, assistant to the president, vice-president, and then executive vice-president.

Q Are you familiar with the fact that Sun and Rowan entered into a contract to drill a well?

A Yes, sir.

Q And can you tell the Court on what block that well was to be drilled?

A I believe it was Block 331, East Cameron.

Q To your knowledge was Rowan ever informed of a hazard, sub-surface hazard or a pipeline in the area of this well site location?

A No, sir.

Q In your experience, and in your practice of drilling wells, is it a formal and customary thing when a company

has a hazard such as a pipeline to inform the drilling company of that hazard?

A Yes, sir.

Q Do they normally inform the drilling company well in advance of your rig going onto location?

A Yes, sir.

* * * * * *

A Oh, I'd say roughly $20,000,000.

Q How many of those jack-up rigs does Rowan Company own, or did it own in August of 1978, sir?

A Well, I can't be specific on that, but I would say probably six or eight.

Q Is the tool pusher the person that moves the rig from one location to another?

A No, sir.

Q Who, for Rowan, would be on the rig to move it from one location to another?

A The rig manager.

Q And he's an employee of Rowan; isn't that right?

A Yes, sir.

Q And in this particular case, when the Rowan Odessa—

A Wait a minute. What's your definition of "moving?"

Q My definition of moving?

A Yes, sir.

Q From here to there, from one place to another.

A Well, you mean he is on there to perform the physical necessities relating to the rig in moving from one point to the other?

Q Yes, sir, that's right. And, in connection with that movement, your—what do you call it—rig manager—

A Yes, sir.

Q —on this particular move, in August of 1978, to East Cameron Parish, Block 330, was a Mr. McCary, wasn't it?

A Not Block 330.

Q Oh, they didn't move to Block 330?

A I believe the contract said to 331.

Q Do you know where they moved?

A As far as I know, they went to 331. That's what the contract said.

Q You didn't give Mr. McCary the information that he was moving to Block 330?

A No, sir, that is not my responsibility.

Q Whose responsibility would it be to give Mr. McCary as to where the rig was going?

A That would be up to the operator.

Q Who is the operator?

A In this case it was Sun Oil Company.

Q So you just sent Mr. McCary out and told him to move the rig anywhere Sun wants to move; is that right?

A No, I didn't say that.

Q What did you tell him?

A We had a contract with Sun saying that they are going to move to Block 331.

Q Did Mr. McCary have a contract with him on the rig?

A No, sir.

Q What did he have on the rig with him that your company gave him?

A In what respect?

Q Any documents.

A He was told where to go.

Q By who?

A He was told what the location was.

Q Are you familiar with a shipping fairway in Block 331?

A No, sir.

Q He was told to go to Block 331 and set the rig down by Rowan?

A That's where the contract said we were going.

Q That's not what I'm asking.

A I don't know what he was told.

Q You don't know what he was told?

A No.

Q Would you expect him to set that rig down on a drilling fairway?

MR. READ: Shipping fairway.

MR. BIENVENU: I'm sorry, shippign fairway.

A Well, you can't set them in a shipping fairway.

Q (By Mr. Bienvenu) You can't put it down in a shipping fairway, can you, legally? Can you?

A No, sir.

Q Does Rowan send its rigs to a new location without looking at a map to see where it's going?

APPENDIX "E"

JOHN C. MAGNER,

after having been first duly sworn by the Deputy Clerk, testified on his oath as follows:

EXAMINATION BY MR. BLAZEK:

Q Would you state your name.

A My name is John C. Magner.

Q Mr. Magner—

THE COURT: Mr. Magner, could you approach the microphone a little bit more.

Q (By Mr. Blazek) Mr. Magner, where do you reside?

A I live in Houston, Texas.

Q And by whom are you employed?

A Rowan Companies.

Q And in what position do you hold at Rowan?

A Executive vice-president.

Q Okay. And, basically, what are you duties at Rowan?

A I'm in charge of several departments, production department, legal department, risk management, contract

negotiations.

Q Were you aware of a contract entered into between Rowan and Sun Oil?

A Yes, sir.

Q Would you tell the Court basically how that contract evolved.

A Yes. Sun Oil had a location on which another contractor had been initially selected for a job, but he was tied up. Our rig became available on short notice, and they made an arrangement with us over a matter of a week, and we consummated a contract.

Q Would you tell the Court where that drilling site was to be under the contract?

A The contract provided for a location in Block 331.

Q That was East Cameron?

A In East Cameron block, yes, sir.

Q Were you aware that Sun Oil changed that drilling site to Block 330?

A No, I was not.

Q Were you personally involved in the convection and the drawing up of this contract?

A Yes, sir, my office was.

Q In the contract with Sun, who agreed to provide the towing services for a field move?

A Sun.

Q And is that found in the Schedule E, No. 2, and also Schedule A, paragraph one?

THE COURT: Counsel, I was under the impression this has been stipulated to. Is there any need to go into it as far as proof is concerned?

MR. BLAZEK: Your Honor, if it has, certainly not.

A The answer is yes to your question.

MR. BIENVENU: I'm not sure how to respond because of his response.

THE COURT: Am I to understand that Sun was to pay for the tug hire, and that Rowan was to order the tugs? That was the stipulation as I recall it.

MR. BIENVENU: We stipulate to that, Judge.

THE COURT: It's been stipulated. Is there any particular reason why we have to go prove it up again?

MR. BLAZEK: No, none whatsoever, your Honor.

Q (By Mr. Blazek) In the Rowan contract with Sun, who agreed to provide the complete services for the surveying and marking of the drilling location?